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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1217

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Petitioner,

v.

UNITED FRUIT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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* The Appendix consisting of four printed volumes and references thereto are as follows: "I-. . . . ; III-. . . . ; and IV-. . . . ".

References to Appendix A through F at the end of this petition are as follows: "App. . . ."

Plaintiff-Petitioner, International Railways of Central America, is sometimes referred to as "IRCA".

Defendant-Respondent, United Fruit Company, is sometimes referred to as "United" or "UF".

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

International Railways of Central America, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on January 27, 1967. Petitioner was plaintiff and respondent was defendant below.

Opinions Below

The opinion of the Court of Appeals has not yet been reported. A copy is appended to this petition as Appendix A. The opinion of the District Court is reported in 254 F. Supp. 233; it is also printed in petitioner's Appendix I (5a-21a).

Jurisdiction

The judgment of the Court of Appeals was dated and entered on January 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

Statutes and Rule

The pertinent statutes are Sections 1 and 2 of the Sherman Act (26 Stat. 209, 15 U.S.C. §§ 1 and 2), Section 73 of the Wilson Tariff Act (28 Stat. 570, 15 U.S.C. § 8), and Sections 4, 4B and 7 of the Clayton Act (38 Stat. 731, 15 U.S.C. §§ 15, 15B, and 18 [1946 ed.] prior to its amendment in 1950); said statutes are reproduced in Appendix C. The pertinent rule, Rule 9(g) of the General Rules of the U. S. District Courts, for the Southern District of New York, is reproduced as Appendix D.

Questions Presented

1. In a treble damage action for violation of the antitrust laws, was it proper for the Court of Appeals to grant summary judgment for the defendant by *refusing to toll* the statute of limitations on the ground that plaintiff failed to show that a demand on the plaintiff to sue defendant for antitrust violations "would necessarily have been fruitless," where

   (i) defendant conceded not only that it dominated a majority of plaintiff's directors during the material period but also that demand on the plaintiff to sue defendant would have been a useless and futile act,

   (ii) the undisputed record evidence is to the same effect,

   (iii) such domination and futility of demand were found as facts in a prior state court litigation,

   (iv) the U. S. Court of Appeals itself held that "the odds may have been against the likelihood that [plaintiff's] board of directors would have authorized an antitrust action against [defendant]" and

(v) the present action was brought *less than four years* (§ 4B of the Clayton Act, 15 USC § 15b) after defendant's wrongful control and domination over plaintiff ceased,

in view of the applicable decisions of this court that the statute of limitations *is tolled* where plaintiff "has been prevented from asserting" its claims, *Burnett* v. *N. Y. Cent. R. Co.*, 380 U. S. 424, 429, and that "the maxim that no man may take advantage of his own wrong" bars "inequitable reliance" on federal statutes of limitations, *Glus* v. *Bklyn. East. Dist. Term.*, 359 U. S. 231, 232-3?

2. In an antitrust case, was it proper to grant *defendant's motion for summary judgment* dismissing plaintiff's damage claims of $435,000,000 where the issue was entirely one of law on conceded facts, the Court of Appeals improperly going behind the facts conceded by the defendant and making a fact determination contrary to such concession and contrary to the undisputed record evidence, the court also drawing inferences, making assumptions and arguing possibilities *in favor of defendant, the moving party,* all contrary to the decision of this court in *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 473, requiring the court to "look at the record on summary judgment in the *light most favorable to* [*plaintiff*], *the party opposing the motion*"?

3. Where defendant shipper, seizing control of plaintiff railroad over which import and export traffic must flow, imposes losses on plaintiff railroad through prohibitive railroad rate and service discriminations against defendant shipper's competition and excludes said competition, and these facts are indisputably established by documents—as well as by collateral estoppel—is not plaintiff railroad entitled to summary judgment under *White Motor Co.* v. *U. S.*, 372 U. S. 253?

Statement

A. Nature of Present Action.

The District Court* found: "There can be no doubt that United controlled IRCA at least through 1961" (254 F. Supp., at 239).

On February 16, 1965, IRCA, no longer under United's domination, commenced this action against United for treble damages for violation of the antitrust laws (15 USC § 15), set forth in First, Second, Third, Fourth and Sixth Claims of the complaint (as amended before answer). United monopolized and conspired to restrain trade in the import of bananas to the United States from Guatemala and in the carriage of commodities between the two countries. Since IRCA was the only railroad of any consequence in Guatemala, United's control and domination over it, since at least 1928, were an important means by which it effected the unlawful monopolization and restraint. United used that monopolization and restraint to the injury of IRCA in its business and property. The different transactions in which IRCA was thus victimized by United's antitrust violations are set forth in separate Claims, briefly summarized as follows:

FIRST: Seeks damages of $75,000,000 because United prevented IRCA, during the period 1928-1961, from obtaining banana traffic from United's competitors.

Second: Seeks damages of $55,000,000 less the principal paid on the *Ripley* state court judgment** because United, 1928-1961, paid IRCA monopolistically low

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* The U. S. District Court's jurisdiction is based on the provisions of Title 15 U.S.C. §§ 15, 26 and 22 and Title 28 U.S.C. §§ 1337 and 1391(c); jurisdiction over the five claims here involved is based on the exclusive jurisdiction of the U. S. district courts over federal antitrust claims.

** *Ripley, et al.* v. *IRCA and United Fruit Co.*, 8 N. Y. 2d 430, 9 N. Y. 2d 758 (rearg. den. 2/23/61, see *infra*, p. 5).

rates on its own bananas and other shipments via IRCA.

Third: Seeks damages of $24,000,000 because United, since 1949, has restricted its own banana shipments over IRCA, and during the period 1961-1964 disposed of its banana plantations in the Tiquisate area of Guatemala to others for cotton planting and other purposes, refusing to permit their acquisition for continuation of production of bananas for export to the United States.

Fourth: Seeks damages of $15,000,000 because United, 1928-1961, prevented IRCA from realizing increased revenue that it would have obtained had other common carriers by water, with rates lower than those charged by United ships, not been excluded by United's unlawful monopolization and restraint, from the United States-Guatemala trade in coffee and other commodities shipped by third parties.

Sixth: Seeks damages for the injury to IRCA's business and property from United's acquisition, unlawful under § 7 of the Clayton Act (15 USC § 18), of IRCA's stock, as the effect thereof might be (and was) substantially to lessen competition or to tend to (and did) create a monopoly (damages are equal to aggregate claimed in first four claims).*

Total damages claimed amount to $169,000,000, and when tripled, to $507,000,000.

B. Prior State Court Judgment, in Derivative Stockholders' Action, That United Breached Fiduciary Obligation Owed Toward IRCA, in Paying Inequitably Low Rates on Its Shipments Over IRCA's Railroad.

In a derivative action brought by minority stockholders of IRCA, in its behalf, against United, the New York State

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* The Fifth Claim, predicated on the facts set forth in the Third Claim, for breach by United of a written contract to ship over IRCA, is not here involved.

Court of Appeals, *Ripley, et al.* v. *IRCA and United Fruit Co.*, 8 N. Y. 2d 430, 9 N. Y. 2d 758 (rearg. den. 2/23/61), affirmed a judgment of the Appellate Division, 8 A. D. 2d 310 (hereafter termed *Ripley*), whereunder IRCA received cash damages from United in excess of $9,000,000 (principal and interest), based on insufficient freight rates charged United by IRCA on United's shipments of bananas and imported supplies over IRCA. Said judgment also fixed rates for the future. The court found that United controlled and dominated IRCA at least from 1928 and stood in a fiduciary relationship to IRCA, and that the inadequate rates paid by United were a breach of its fiduciary duty.*

With respect to *Ripley's* specific findings, the present amended complaint alleged that "[d]efendant is estopped from challenging any of the specific material facts found in the State Court action. *Lyons* v. *Westinghouse*, 222 F. 2d 184 (CA 2)" (II-6, ¶ 11). (Certain *Ripley* findings are in Vol. III of the Appendix).

C. IRCA's Pleaded Disability to Sue United, by Virtue of Adverse Management Control, as Tolling Four-Year Federal Statute of Limitations on Antitrust Claims.

The amended complaint alleged that: "United had management control over IRCA since at least 1928 continuously to January 1962 and by virtue thereof IRCA acted, during that period, in the interests of United rather than for all its stockholders. Said control and domination be-

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* The Appellate Division held (8 A. D. 2d, at 317):

"While there was an attempt to give a verisimilitude of complete independence and separation between the companies, the realities presented a case of *complete domination.*" (Italics supplied)

In affirming, the Court of Appeals held (8 N. Y. 2d, at 436):

"We are satisfied that the findings are sustained, that United was in practical control of IRCA at least after the creation of the voting trust in 1928, and stood in a fiduciary relationship to IRCA. . . ."

tween 1928 and 1961 was the instrument by which . . . United prevented IRCA from bringing suit against it for relief therefrom under the anti-trust laws, thereby tolling the Statute of Limitations" (II-10, ¶ 24).

D. Commerce Involved.

The important trade and commerce involved is that between Guatemala and the United States, principally banana imports from Guatemala. Details are set forth in the Amended Complaint, paragraphs 5, 6, 7, 8, 9 and 10 (II-4-6).

E. United's Monopolization of This Commerce.

United at all material times imported most or all of the bananas from Guatemala to the United States and is also the dominant importer of bananas from all other sources (I-188a-189a). United is also the dominant common carrier by water of the other traffic between the two countries (III-200a-201a). United acquired its dominant position by a series of mergers, acquisitions, and restrictive, exclusionary, and other predatory practices detailed in the Appendix, Volume I at 190a-214a. Unquestionably United has exercised effective power to control prices of bananas in this country; also to exclude Guatemalan and other competitors from the banana import trade and from the water carriage of other traffic between the two countries (I-214a-219a; III-200a-201a).

F. Plaintiff's Railroad a Prime Instrument and Victim of This Monopolization.

Plaintiff's Guatemalan railroad was the bottleneck through which most of this traffic had to flow between Guatemala and the United States (II-2, par. 3(a); I-251a, par. 2). Accordingly, it became a prime instrument by which defendant United acquired and maintained its monopolization of that trade. Plaintiff also, thereby, became the prime victim of that monopolization.

The material facts were conclusively established in *Ripley, supra,* and are indisputably established by the documents in the record here. Moreover, by failing to contest plaintiff's statement under Rule 9(g) in the District Court that "there is no genuine issue to be tried" as to control and domination through 1961 and the antitrust claims on which plaintiff seeks summary judgment (I-180a-183a), United is deemed to have admitted all material facts (App. 31a).

G. United's Acquisition of Management Control Over IRCA and Its Monopolistic Purpose.

The Court of Appeals stated: "From its incorporation in 1904, IRCA's fortunes were closely linked to [United's] banana business in Guatemala, initially in the east. The importance of the two companies to each other increased when, in the 1920's [United] became convinced of the desirability of expanding its plantations around Tiquisate in western Guatemala" (App. 3a).

In 1928, United learned of the intention of certain bankers to take stock control of IRCA and took prompt steps to secure control for itself. United, with banker collaboration, purchased the control block of IRCA's dominant shareholder, Minor C. Keith, and placed the same in a 10-year voting trust which was operated out of the law office of Bradley W. Palmer, a director, member of the executive committee and counsel to United.* United took actual control of the operations and operating management of IRCA (III-13a-20a; 37a-41a).

In 1936, United acquired from IRCA 185,000 shares of common stock of IRCA, giving it 256,000 common shares or 42.68% of the voting stock (500,000 shares of common and 100,000 of preferred) and cementing control. The stock ownership thus became insurance against changes in

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*That acquisition made UF, with 71,000 shares of common stock, the largest single shareholder (App. 3a).

directors and also guaranteed a continuance of management satisfactory to United. United's dominant control over IRCA had not been disclosed to the public stockholders of IRCA (III-21a-41a).

The Referee* in *Ripley* expressly found that the purpose of United's stock acquisition and resulting control over IRCA was to gain monopolistic control over competitors (banana growers, middlemen, shippers and steamship companies) and over its own payments to IRCA (Report and Decision, pp. 183-4) (Also see III-21a-26a; 201a; 212a):

> "Summarizing the foregoing it appears so clear as to be practically conclusive that as the U.F.Co. Agricola [CAG]** banana business in the western area grew and its prospective potentialities in the foreseeable future were realized by U.F.Co. *the idea was adopted of taking over control of IRCA and using its transportation by rail to and the wharf and port facilities at Barrios for shipping its bananas, exclusively, and in any event practically free, of competitive shipping,* the vessels of U.F.Co. also having the beneficial use, *beyond any possible 'competitors'* of the IRCA Barrios pier. The many other unusual benefits of U.F.Co. in the contracts with IRCA, *the discouragement or exclusion of competitive growers, middle men, and shippers,* indicate three main inferences which are required to be drawn from the facts shown by the evidence. They are:
>
> * * * * * *
>
> *"The obtaining of very low rates for U.F.Co. and very high rates for any possible competitor stifled competition."* (Italics supplied)

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* To hear and determine; his findings and conclusions were affirmed on the appeals.

** CAG—Compania Agricola de Guatemala, United's wholly-owned instrumentality for production of bananas on the western side of Guatemala.

Indisputably, those were the threatened and realized effects of such stock acquisitions, thereby unduly threatening and restraining the import trade of the United States. The U. S. Court of Appeals recognized United's monopolistic purpose (App. 4a-5a):

> "As indicated, UF's most important interest in IRCA was in having low freight rates and special services for its own products and in denying these to its competitors. On banana shipments from western Guatemala, UF for many years paid only $60 per car, performing the wharfage service and loading at Barrios with its own labor, whereas independents paid $130 per car for the line haul and about $72 for wharfage and loading, on which IRCA made a profit. For bananas from eastern Guatemala, UF was charged 11½ or 12 cents per stem as against 20 cents for independents. On imports through Barrios to western Guatemala IRCA charged the public $350 or more per carload as against $60, later $100, to UF. In numerous instances IRCA, at UF's instance, denied to independents services comparable to those furnished its controlling stockholder."

After United's motion for reargument was denied in *Ripley* on February 23, 1961 (9 N. Y. 2d 758) which was within four years of the date this action was commenced, final judgment was entered in *Ripley* on March 1, 1961 (I-176a) and in January, 1962, United disposed of its controlling stock interest in IRCA.*

H. United's Suppression of and Discrimination Against Independents' Banana Traffic Over IRCA, 1928-1962.

United's suppression of independents' banana traffic over IRCA is detailed in the *Ripley* findings of fact (III-56a-91a).

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* Required to divest itself of all of IRCA stock by June 30, 1966 under final judgment in *United States* v. *United Fruit Co.* (I-82a-83a).

United sought and utilized its control and domination over IRCA to suppress competition in the banana business in Guatemala (III-56a, B305). There was no substantial actual competition to United in the Guatemalan banana business for over forty years after the founding of IRCA (III-57a, B307). The suppression of and discrimination against the independent banana traffic were embodied in contracts between United and IRCA (III-57a-60a), and exercised through supervision of IRCA rates to independents (III-61a-73a). They were manifested in United-inspired refusals by IRCA to do business with independents (III-73a-74a; 62a-67a), by prohibitive and discriminatory rates (III-61a-73a), by withholding special facilities and services afforded United (III-76a-90a), and by information to United from IRCA on the independents' moves (III-75a).

Prior to 1939, United arranged with IRCA to ignore requests for the quotation of rates on export bananas and at last resort, to quote sums approximating $630 per car (III-62a-73a). In 1939, IRCA instituted a public tariff of $130 per car plus about $72 for wharfage and loading aboard ship. United in this period paid $60 per car. Later, during the *Ripley* litigation, United raised the rate to about $85 per car. Furthermore, the CAG rate, lower than the independent banana rate, was not warranted by differences in cost to IRCA (III-141a, D106).

United arranged to have IRCA remove its own ownership labels from IRCA's banana cars and to substitute the name of CAG, thereby giving the false appearance of United ownership and consequent unavailability to independents. IRCA *refused* to furnish independents with special banana cars and extra train service (III-79a-82a) and permission to install loading conveyors on the IRCA pier (III-88a-90a); although all of these services were required for an efficient banana operation and were furnished to United and CAG.

In order to avert drastic Guatemalan government intervention, IRCA, in 1946, adopted a quota system in the allocation of its own banana cars and locomotives, which provided first for the complete filling of all the transportation requirements of United and CAG and then the division of the remaining balance of available equipment, if any, among the independents. Because of United's requirements, IRCA frequently did not furnish cars to independents or did not deliver all they ordered (III-84a-88a).

These sharp restraints had the obvious effect on independent banana traffic. (The statistics are set forth at II-18.) No substantial independent banana traffic ever moved over IRCA from eastern Guatemala. There were no shipments of independent bananas from western Guatemala over IRCA prior to January 1945, and such movement as then occurred was substantially less than it would have been in the absence of United's monopolization through acquisition of IRCA stock and management control over it.

I. United's Depressing of the Rates Paid to IRCA on Its Own (Including Its Wholly-Owned Subsidiary CAG's) Shipments.

United used its control and monopolistic power over IRCA to depress the rates paid to IRCA on its own (including CAG's) shipments.

In *Ripley*, the court found that since 1943 the fair market rate on export banana shipments from western Guatemala over IRCA was higher than the $130 line haul rate charged to independents (III-187a; also see III-126a-186a). On shipments from eastern Guatemala, the fair market rate was higher than that charged United (III-187a-192a). On imports, the public tariff, about $350 per car (III-195a), was found to be the fair rate, while United paid $60, and later $100, for a comparable haul (III-196a).

Ripley judgment in fixing fair rates payable by fiduciary to cestui, did not correct for monopolistic discount enjoyed by United.

The *Ripley* judgment escalated the rates payable by United to IRCA on CAG banana shipments to $75 per carload effective January 1, 1946, increasing progressively $5.00 per year commencing in 1948 to reach $130 per carload after January 1, 1958, but nothing for wharfage and loading (Judgment, decretal parag. 8(c), (d), I-171a-172a). During this period the public tariff on such shipments was $130 per carload plus about $72 for wharfage and loading and the fair market rate higher (III-187a, D478).

The *Ripley* judgment escalated the rates payable by United to IRCA on CAG imports by 10 percent per year (Judgment, decretal parag. 8(e), I-172a-173a). These small increments would take a long time to raise the CAG rate from $100 to the public rate of $350. No increases were provided for CAG's diesel imports or for wharfage on United-CAG imports (Judgment, decretal parag. 11(a), I-174a).

What accounts for the discrepancy between the public, fair market rates, as found by the courts in *Ripley*, and the rates they decreed payable by United? The New York Court of Appeals, in refusing to review, on the stockholders' appeal, the Appellate Division's determination of the amount of unjust enrichment, because made on the "facts" (8 N. Y. 2d, at 446-7), expressly held that the failure to make correction was sound because the State court had no power to consider monopolization:

> "The point in the case insofar as the New York courts are concerned is not so much whether Irca has fostered a monopoly in United in the Guatemalan banana business, as whether it has been adequately paid for what it has done for United." (*Id.* at 446)

J. United's Monopolization of Water Carriage of Coffee From, and Commodities to, Barrios, Shipped by Third Parties.

United has used its control over IRCA since at least 1928, to divert traffic to Barrios and there to United steamers for the ocean voyage between the United States and Guatemala (III-201a, 202a, 212a, 204a-213a, 134a).

The combined rail-water rate on traffic moving through Barrios, Guatemala, to southern and eastern ports of the United States was competitive with the combined rail-water rate on traffic moving out of the Pacific side of Guatemala to those ports. United dictated the division of the combined rail-water rate through Barrios between it and IRCA. United's steamship competition was ready to carry coffee from Barrios at 22 cents per 100 lbs. compared with United's much higher rate of at least 37 cents (III-199a-200a, F12); this higher rate, reflected in the division with IRCA, deprived IRCA of at least 15 cents per 100 lbs.

The Decisions Below

The District Court had granted defendant's motion for summary judgment on the ground of *res judicata* (I-11a-16a) but the Court of Appeals reversed this determination (App. 18a-22a) and it is not involved in this petition.

The District Court also granted defendant's motion for summary judgment on the ground the statute of limitations was not tolled because a derivative action in behalf of the corporation *might* have been brought by a public stockholder or minority director (I-17a-21a). This ground the Court of Appeals purported not to pass on (App. 16a).

Nevertheless, although the action was brought within four years after United surrendered its domination over IRCA, the Court of Appeals rejected tolling of the statute of limitations (App. 18a) and granted summary judgment

dismissing the complaint as to all violations occurring before February 16, 1961. The basis for the decision below was that plaintiff could not show that a demand by a public stockholder or minority director, after May 1959, on the plaintiff's dominated majority directors to sue defendant "would necessarily have been fruitless" (App. 15a). This despite United's concession that demand was a useless and futile act (App. 32a) and the Court of Appeals' candid recognition that "the odds may have been against the likelihood that [plaintiff's] board of directors would have authorized an antitrust action against [defendant]" in that period (App. 14a).

The District Court, affirmed by the Court of Appeals, denied plaintiff's motion for summary judgment on the issue of liability on all antitrust claims of the amended complaint (except the Third) and of partial damages on the Second and Sixth Claims, principally on the ground that it granted defendant's motion for summary judgment (I-11a; App. 23a).

Reasons for Granting the Writ

1. Tolling a federal statute of limitations because the wrongdoer, by adverse domination, has prevented the corporate victim from asserting its rights is a novel question of general importance which this Court should decide.

2. The decision below denying tolling immunized flagrant violations of the antitrust laws over a 30-year period (not remedied by the consent decree or the *Ripley* state court judgment) even though plaintiff did not sleep on its rights but was disabled from instituting suit by the defendant's domination. Ironically, that very domination was also the instrument by which defendant monopolized an important segment of the import and export trade of the United States. The decision below thus presents, also, a

question important to the public policy of the United States against monopolies.

3. Moreover, the decision below should be reviewed because it conflicts with basic principles laid down by this Court.

A. The Court of Appeals, going off on a tack not suggested in the District Court nor raised by United in either court, first held that the material issue on tolling was, whether "a demand" by a public stockholder or a minority director on the plaintiff's board of directors to sue "would necessarily have been fruitless" (App. 15a). It then granted summary judgment by finding against plaintiff on that newly created issue, even though (1) defendant had not only conceded its domination over six of the nine directors of plaintiff during the material period but had also conceded that demand on plaintiff to sue would have been futile, (2) the record evidence is uncontested to the same effect, (3) such domination and futility were found as facts in *Ripley*, and (4) the Court of Appeals itself considered it unlikely that such demand would have induced the board to authorize suit. Clearly, the Court of Appeals drew inferences, made assumptions and argued possibilities in favor of defendant, *the moving party* on the limitations issue, all contrary to *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464, 473, which requires the court to "look at the record on summary judgment in the light most favorable to [plaintiff], *the party opposing the motion.*"

B. Adverse domination, at least such as makes it unlikely that the dominated majority of the victim's board of directors would prosecute an action vigorously and in good faith against the dominating wrongdoer, is sufficient to invoke *Burnett* v. *N. Y. Cent. R. Co.*, 380 U. S. 424, 429, that the statute of limitations is tolled where the plaintiff was "prevented" from bringing suit. It is also sufficient to make applicable *Glus* v. *Bklyn. East. Dist. Term.*, 359 U. S.

231, 232-3, that the statute of limitations is tolled where otherwise a defendant would have the advantage of his own wrong. The decision below clashes with those cases and the principles on which they were decided.

C. In *Minn. Mining & Mfg. Co.* v. *N. J. Wood Finishing Co.*, 381 U. S. 311, 318, this Court ruled in favor of tolling the antitrust limitations statute to give "considerable impetus" to the "policy" of Congress, that "private antitrust litigation [be] one of the surest weapons for effective enforcement of the antitrust laws." The decision below denying tolling ignores that strong public policy.

D. In *White Motor Co.* v. *U. S.*, 372 U. S. 253, 259-60, this Court held that an indisputably established *per se* violation of the antitrust laws should be condemned by summary judgment. The decision below defies that ruling.

Discussion of Errors of Court of Appeals

a. The Court of Appeals, in summarily rejecting tolling because plaintiff had not "rule[d] out the possibility of a corporate suit against [defendant] on the demand" of a public stockholder or minority director of plaintiff between May 1959 and February 1961 (App. 18a), unfairly mousetrapped the plaintiff. United *conceded* that from May 1959 to February 1961, United dominated six out of the nine IRCA directors. United's position in the District Court and Court of Appeals (App. 8a) was simply that as a matter of law "the presence of one or more independent minority directors is sufficient to stop the tolling of the statute . . . and that from at least 1959 onwards there were not one but three indepedent directors of the Railway . . . ."*

*Defendant's Reply Brief On Its Motion for Partial Summary Judgment (Rule 56) p. 29, dated June 23, 1965, filed in the District Court (App. 33a).

In the Court of Appeals, United's position was:*

> "We may concede for present purposes (as *Ripley* determined) that United dominated Railways to such an extent as to become accountable to Railways on a fiduciary basis. We may even concede for present purposes that the degree of 'domination' found in *Ripley* may have been sufficient to *prevent Railways from bringing an action in its own name,* as the Appellate Division pointed out in the quotation at appellant's br. 45-6 ['It is equally obvious here that demand upon the directors of IRCA to sue UFCo, in connection with the acts and transactions complained of . . . would have been a *useless and futile act.* . . . No fair and honest consideration of such a demand could have been anticipated under the circumstances; nor could there be any reasonable expectation of any just and vigorous prosecution of a suit. *The IRCA board was under the influence of UFCo with respect to the causes of action which could be asserted against UFCo . . .* * * * *Surely,* we would not compel them to entrust the prosecution of such an action in the hands of persons who would be opposed to the success of the suit']." (Italics supplied)

Instead of viewing the record in the light "most favorable to [IRCA], the party opposing the motion", *Poller, supra,* the Court of Appeals ignored both United's concessions and the record evidence against it.

The three minority directors elected in May 1959 (Cunningham, Yaeger and Ruckle) became IRCA directors in the belief that the majority of the directors (six) were dominated by United (I-130a); that McGovern (Chairman of the IRCA Board) "was definitely a fruit company em-

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* Brief of Defendant-Appellee, p. 56, dated October 24, 1966, filed in the Court of Appeals (App. 32a).

ployee" (I-135a); that everything "was cut and dried between Mr. McGovern, Tennyson and several of the other directors" (I-135a); that the board "was very definitely under the domination of the United Fruit Company" (I-135a); and that "Haase [President] was a dominated director" (I-135a).

The six directors dominated by United between May 1959 and February 1961 were McGovern, Tennyson, Partridge, Willer, Haase, and McGregor. The first four named were directors since at least 1949. As to them, the Appellate Division in *Ripley* held (8 A. D. 2d at 317): "the realities presented a case of *complete domination.*" (Italics supplied.) Haase was tagged as a "dominated director" (I-135a) which is undisputed in the record and McGregor was elected in 1958 (I-127a) as United's nominee.* This accounts for the six directors dominated by United from May 1959 through February 1961. The Court's holding as to the six directors was contrary to United's concession and the undisputed evidence.

United, in its answer (par. 15), admitted that "United's stock constituted the majority of all shares actually voted at IRCA's annual meetings for the election of directors from 1938 through 1960" (I-253a), the last term expiring in May of 1961.

Despite the record evidence and United's concessions, on the critical issue of whether a majority of IRCA directors would have voted to sue United for antitrust claims between May 1959 and February 1961, the Court of Appeals, contrary to *Poller, supra;* drew inferences, made assump-

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* "In 1958, after the first appeal in *Ripley* was filed, United advised IRCA that it was not going to vote its IRCA stock at the coming stockholders meeting. However, at the meeting itself, when it appeared that an independent board of directors might be elected, United reversed itself and voted its common stock and elected its own nominees" (I-122a).

tions and argued possibilities in favor of United, the moving party.*

The degree of erroneous argument in favor of United is epitomized by the court's discussion (fn. 9, 15a) of a hypothetical stockholders meeting after the trial court's decision in *Ripley*. It gratuitously assumes a meeting at which *5%* of the outstanding shares fail to vote (a major fallacious premise in light of the actual fact that nearly *15%* of the outstanding stock failed to vote during the 1952 proxy fight). The court then builds on this false premise and states that "UF would have had to retain the suffrage of 29,000 of the independent shares to prevail." However, if *15%* did not vote at this hypothetical meeting as in 1952, then UF could even lose all 51,000 shares of public shares it received in 1952 and still prevail with its own block of IRCA stock (256,000 shares).

The court below stressed the fact that after the trial court in *Ripley*, over IRCA's strong opposition, made its decision requiring United to pay money to IRCA, for breach of fiduciary obligation, IRCA's general counsel stated in the appellate courts that they supported the stockholders' appeal for a larger judgment (App. 15a). The Appellate Division emphasized United's complete domination over IRCA and its disability to sue United, in

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* E.g. (i) one cannot "assume that the other directors would have been obdurate" (App. 14a); (ii) after *Ripley's* "affirmance by the New York Courts" (App. 14a) (United's motion for reargument was denied by the Court of Appeals of the State of New York on February 23, 1961, 9 N. Y. 2d 758, within the statute of limitations here); (iii) "the legal implications of arbitrary refusal to bring an apparently justified suit would hardly have escaped the minds of the directors, and certainly not of counsel to whom they would surely have referred a stockholder's or director's request" (App. 14a) (said counsel for IRCA had been counsel for the thirty years of United's domination; *Ripley* found that "IRCA did not have independent counsel" and that the fees for its attorneys "were submitted to United for approval in advance of their payment by IRCA" (III-33a)).

face of the fact that IRCA's attorney, after the Referee rendered his decision against United, reversed position and told the Appellate Division that he now favored judgment against United. And the Appellate Division, affirmed by the Court of Appeals, rendered a judgment predicated on continuing adverse domination, applicable also to the period after that switch in position by IRCA's counsel and continuing past 1959 and into 1961. And the U. S. District Court found expressly that "there can be no doubt that United controlled IRCA at least through 1961" (I-17a). Disabled to bring the *Ripley* action, IRCA could not realistically bring an antitrust claim against United for half a billion dollars, while United's General Attorney, James McGovern, was Chairman of IRCA's board.

The findings in *Ripley* are conclusive on the adverse management control, requisite for tolling. *Ripley* expressly found that United exercised "complete domination" over IRCA (8 A. D. 2d, at 317); that United thus had "a divided loyalty" (*id.*); that the "existing relationship precluded any possibility of genuine arm's length bargaining between" them (*id.*); and that United abused the resulting "fiduciary relationship" (8 N. Y. 2d at 436) by enriching itself unjustly at IRCA's expense to the tune of millions of dollars (*id.*, at 446). This is "adverse domination" to the hilt, ample to toll the statute of limitations.

The Court of Appeals sensed the infirmity in its grant of summary judgment when it stated that the issue, which it made critical to tolling, of whether "demand . . . would necessarily have been fruitless" (App. 15a) is "one on which plaintiff might have been entitled to take evidence" (App. 15a fn. 10). The court's reasons (in same fn.) for not allowing plaintiff to go to trial on that issue are then given as follows: Plaintiff "raised no objection either in the district court or here to disposition of UF's motion on the affidavits and records submitted, and it has not ad-

verted to any further evidence that might be introduced on this point". Naturally, plaintiff raised no objection nor requested an opportunity to offer evidence on a point United had conceded and upon which the record evidence was undisputed in favor of plaintiff! That attempted justification offered by the Court of Appeals for entering summary judgment dismissing over $435,000,000 of federal antitrust claims is akin to a "catch-penny contrivance to dispose of cases merely for the sake of disposition and . . . [clearing up] dockets . . ." 1B Moore, Federal Practice Par. 0.412(1) at 1810 (2nd ed. 1965) instead of carrying out the Congressional mandate for enforcing the antitrust laws and correctly applying the principles applicable to summary judgment.

If the Court views the record in the light most favorable to IRCA, the party opposing the motion, then *no* summary judgment should have been granted for United. If anything, the concessions, record and inferences decisively support IRCA that a majority of the IRCA directors were dominated by United between May 1959 and February 1961, as to prevent IRCA from asserting its antitrust claims against United. Here, at least, as in *Poller, supra* (472-3): "We cannot say on this record that 'it is quite clear [t]hat the truth is' [that demand would have been fruitless]. Certainly, there is no conclusive evidence supporting the respondents' theory."

United failed to meet the standard in *Poller, supra* (468):

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' . . . [for] the purpose of the rule is not to cut litigants off from their right of trial . . . if they really have issues to try."

b. In deciding that it would be *unfair to defendant* to toll the statute for its antitrust violations, the Court of Appeals used the natural consequences of defendant's antitrust wrongs to justify "the unfairness". Contra *Glus* v. *Bklyn. East. Dist. Term., supra,* it gave the defendant "the advantage of [its] own wrongs" and thereby failed to bar an "inequitable reliance on statutes of limitations." Moreover, contra *Burnett* v. *New York Central R. Co., supra,* the decision below undermines "congressional purpose" by refusing to toll the statute where the plaintiff "has been prevented [by the defendant] from asserting" its antitrust claims against the defendant.

The main thrust of the Court of Appeals' holding on unfairness was that "UF has already suffered two judgments [*viz.* the consent decree and the state court judgment in *Ripley*] for its misdeeds and recovery of damages for more than three decades would result in a huge windfall to most of the present stockholders of IRCA and an unexpected loss to many innocent ones of UF" (App. 17a). However, the consent judgment, obtained by the United States of America, has never been deemed to bar private enforcement and, in fact, did not remedy the wrong to plaintiff. The *Ripley* judgment in no way compensated IRCA for its damages due to UF's antitrust violations. Indeed, the *Ripley* judgment itself implicitly violated the federal antitrust laws by continuing a dual price structure which discriminated against independent shippers of bananas, and gave a discount to United by reason of its Guatemalan monopoly. That damages are huge and have accrued for three decades is an index of the magnitude of victimization of plaintiff by defendant; that consequence of UF's adverse domination of IRCA, argues for stricter enforcement of the antitrust laws, not immunity. The lower court's concern that there may be "an unexpected loss to many innocent [stockholders] of UF" is misplaced and, in any event, incorrectly premised, as United's stock-

holders have been reaping the benefits of United's antitrust violations against IRCA over the decades plus the use of that money for other investments.

The court below spoke of a huge windfall to IRCA which "might seem rather an overkill" (App. 17a). However, the very purpose of the antitrust laws is to give the victim of antitrust violations a windfall of at least twice its regular damages, in addition to the damage amount, and any "overkill" here results from UF's "*oversteal*", i.e., the cumulative effect of 34 years of wrongdoing. The Court of Appeals has opted for an overkill windfall for the wrongdoer and nothing for the victim—a strange way to enforce the Congressional policy in favor of private enforcement of the antitrust laws!

In its analysis of the "windfall" to IRCA's common stock, the Court below ignored the claims of creditors and the $18,000,000 priority of the preferred stockholders of IRCA.* To excuse the entire antitrust violation because the amounts are huge is to give the wrongdoer the advantage of its own wrong, contrary to *Glus*.

A natural consequence of UF's antitrust torts against IRCA was that IRCA stockholders did not continue to hold their "sour" investment over the three decades (App. 17a-18a; fn. 13); this explains why only an estimated 10% of the current IRCA stockholders owned their stock prior to 1945.** However, the whole point is immaterial because once again the court below points to results which flow from UF's wrongdoing, to support its holding of unfairness to United. Indeed, the "number of stockholders" analysis

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* IRCA has 100,000 shares of $100 par value preferred stock outstanding with a total par value of $10,000,000 and dividend arrears of over $8,000,000 (I-121a).

** The sample used by the court below (App. 17a-18a, fn. 13) is statistically unsound and is another example of the court's piling one false premise on top of another.

ignores IRCA as a corporate entity and erroneously treats this case as a stockholders' suit.

The court below states that "disregard of the statute of limitations might impede efforts by the Government to obtain divestitutes by consent" (App. 17a, fn. 12). But that argument ignores the Congressional mandate to enforce private triple damage actions to *deter* corporations from violating the federal antitrust laws as United did; successful deterrence will eliminate the problem of consent decrees.

The Court of Appeals also stated that United is at a disadvantage because it will not be able to share pro tanto "in any recovery from itself" since it sold its 42% interest in the voting stock, represented by 256,000 shares of common stock in IRCA.* Besides ignoring the claims of creditors and the $18 million claim of the preferred stock in the hands of the public, that holding ignores the benefits that would result from a decision favorable to IRCA, to wit, vindication of plaintiff's rights and the Congressional antimonopoly policy, and the deterrent effect on companies abusing a control position in another company. Moreover, the statement is no weightier than a claim by United that it did not know the law when it sold its IRCA stock.

The court's footnote 12 (App. 17a) about a hypothetical 90% interest in a corporation is far removed from the position of United, and ignores IRCA, the victim. United, the wrongdoer, took its risks and was caught. Now in accordance with the Congressional mandate it should refund its illegal gains, tripled.

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* Mr. Munro, a preferred stockholder, stated at the 1952 IRCA stockholders' annual meeting: ". . . if you take the market appraisal of today of the entire holdings of United Fruit Company, 256,000 shares, you will find that that is less than *one-half of the outstanding arrears* on that preferred stock, and I think it is about time that the preferred stockholders be considered the real equity of this company and not the common" (IV-120a).

c. Domination constitutes an exception to the running of the statute of limitations on federally created causes of action which dissolves only with the ending of the domination. This exception rests on a foundation of policy enunciated by the Supreme Court of the United States in *Glus, supra,* tolling the F.E.L.A. statute of limitations because of an innocent misrepresentation—not so strong a case as the present one of oppressive and wrongful domination preventing the plaintiff's assertion of rights. There the Court held (at 232-3):

> "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations."

The same result should follow, *a fortiori,* in antitrust cases. *Minn. Mining & Mfg. Co.* v. *N. J. Wood Finishing Co.,* 381 U. S. 311, 318.*

d. The Court of Appeals, in affirming the denial of plaintiff IRCA's motion for partial summary judgment, ignored

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* In *Kansas City, Missouri* v. *Federal Pacific Electric Co.,* 310 F. 2d 271, 283 (C. A. 8), an antitrust case, the court quoted the above language from *Glus* and held as follows:

> "An examination of the legislative history demonstrates to us that Congress, acting within its authority, intended that the maxim that no man may take advantage of his own wrong should be read into § 4B." [the Federal statute of limitations]

The court stressed the public policy in favor of tolling as to antitrust causes of action:

> "Congress was equally concerned with efficient enforcement of the Clayton Act which certainly cannot be accomplished if [§ 4B] is given a literal construction." (p. 284)

Accord: Westinghouse Elec. Corp. v. *Pacific Gas & Elec. Corp.,* 326 F. 2d 575, 580 (C. A. 9).

White Motor Co. v. *U. S.*, 372 U. S. 253. There, the Supreme Court specified two classes of cases where normally "summary judgments have a place in the anti-trust field"; *viz.*

(1) where "the gist of the case turns on documentary evidence"; or

(2) where there is a "price-fixing" or other "per se" violation (*id.*, 259-60).*

United's exclusion of its competition by fixing the price of transportation and by other predatory practices is demonstrated by the documentary evidence, ignored by the courts below. United failed to submit any refuting evidence. Indeed, under the District Court's Rule 9(g) (App. 31a), it conceded, by failure to contest, plaintiff's statement that "there is no genuine issue to be tried" as to the antitrust claims on which plaintiff seeks summary judgment. (I-180a-183a).

That United's monopolistic exclusion of competition, in the import and export trade of the United States, through control of a railroad bottleneck, violates the antitrust laws is not open to doubt.**

That IRCA was "injured" in its business or property, within the meaning of § 4 of the Clayton Act, by reason of United's antitrust violations, is clear under the authorities. The *direct relations* between United and IRCA pro-

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* The court noted the following as to *per se* violations:

"That category of anti-trust violations is made up of 'agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use'" (*id.*, 262)

** *U. S.* v. *Reading Co.*, 253 U. S. 26, 48; *Swift & Co.* v. *U. S.* 196 U. S. 375; *Standard Oil Co.* v. *U. S.*, 221 U. S. 1; *U. S.* v. *Lehigh Valley R. Co.*, 254 U. S. 255; *U. S.* v. *Swift & Co.*, 276 U. S. 311, 286 U. S. 100.

duced the violations and the resulting injury; that clearly brings it within § 4, both as to the undue restraint and monopolization forbidden in the Sherman and Wilson Acts (15 U.S.C.A. §§ 1, 2, 8) and the acquisitions and uses of IRCA stock forbidden in § 7 of the Clayton Act (15 U.S.C.A. § 18).

Radovich v. *Natl. Football League,* 352 U. S. 445;
Radiant Burners v. *Peoples Gas Light & Coke Co.,* 364 U. S. 656;
Continental Ore Co. v. *Union Carbide Corp.,* 370 U. S. 690, 699-700.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

March 31, 1967.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 178—September Term, 1966.

(Argued November 29, 1966 Decided January 27, 1967.)

Docket No. 30638

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff-Appellant,

—v.—

UNITED FRUIT COMPANY,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Appeal by plaintiff, in an action in the District Court for the Southern District of New York for treble damages under the antitrust laws and other relief, from an order, Sylvester J. Ryan, *Judge,* 254 F. Supp. 233, granting a motion for partial summary judgment by defendant and denying such a motion by plaintiff. Order granting defendant's motion affirmed in part and reversed in part; order denying plaintiff's motion affirmed.

AARON LEWITTES (Leventritt, Bush, Lewittes & Bender, New York, N. Y.) (M. Victor Leventritt, Sidney Bender, Abraham K. Weber, of Counsel), *for Plaintiff-Appellant.*

RALPH M. CARSON (Davis Polk Wardwell Sunderland & Kiendl, New York, N. Y.) (Porter R. Chandler, Robert F. Dobbin, of Counsel), *for Defendant-Appellee.*

FRIENDLY, *Circuit Judge:*

This action was brought on February 16, 1965, by International Railways of Central America (IRCA) against United Fruit Company (UF) in the District Court for the Southern District of New York. The complaint, analyzed in more detail below, asserted six claims, the first four and the sixth seeking treble damages for breach of the antitrust laws, 15 U. S. C. § 15, and the fifth, predicated on the same facts as the third, primarily seeking damages for breach of contract. The asserted damages, going back in some instances to 1928, when trebled were in excess of a half billion dollars.

UF moved for summary judgment (1) dismissing the first, second, fourth and sixth claims and so much of the third and fifth as related to matters occurring before 1961, on the ground that their prosecution was barred by the final judgment awarding damages through December 31, 1960, in a derivative action brought in the New York courts by stockholders of IRCA (hereafter "the *Ripley* action") against that company as a nominal and UF as the real defendant; and (2) dismissing so much of the claims (other than the fifth insofar as it was based on alleged breach of contract) as related to matters occurring before February 16, 1961, as barred by the four-year statute of

limitations for antitrust actions, 15 U. S. C. § 15b. Plaintiff countered with a motion for partial summary judgment as to UF's liability on the first, second, fourth and sixth claims and also as to damages on the second and sixth, mainly on the basis of the record and judgment in the *Ripley* action. Judge Ryan granted both branches of UF's motion and denied plaintiff's, 254 F. Supp. 233 (1966). A judgment was entered which made the recitals appropriate under Rule 54 with respect to the grant of defendant's motion and contained certification under 28 U. S. C. § 1292(b); we granted leave to appeal so that the entire matter might be before us.

I.

A statement, necessarily condensed, of the relations of the parties and of previous litigation is essential to understanding. For the former we draw largely on the findings made by the referee in the *Ripley* action in 1957, which were affirmed by the hierarchy of New York courts.

IRCA operates the most important railroad in Guatemala, running across the country from Puerto Barrios on the Caribbean, the principal seaport, with one branch veering southward into El Salvador and another extending from western Guatemala north to the Mexican border. From its incorporation in 1904, IRCA's fortunes were closely linked to UF's banana business in Guatemala, initially in the east. The importance of the two companies to each other increased when, in the 1920's, UF became convinced of the desirability of expanding its plantations around Tiquisate in western Guatemala.

In 1928 a syndicate including UF and banking firms purchased the interest of IRCA's dominant shareholder, Minor C. Keith, this making UF, with 71,000 shares of common stock, the largest single shareholder. The stock purchased by the syndicate was placed in a voting trust under which

UF, through a trust company as its agent, nominated two of the five trustees. In fact UF took over control of IRCA, although its stock ownership was concealed. By the mid-1930's its interest in western Guatemala and consequently in IRCA increased; its new president, Zemurray, made known that UF would pursue its development plans only if its control of IRCA was solidified, for the double purpose of insuring continuation of the favorable freight rates and service on its own products and of preventing similarly favorable rates to competitors. In 1936, Compania Agricola de Guatemala, S. A. (Agricola), a wholly owned subsidiary of UF, acquired 185,000 shares of unissued IRCA common stock at a low price and the voting trust was dissolved. UF's 256,000 common shares then constituted 42.68% of IRCA's total voting stock, 500,000 shares of common and 100,000 of preferred. At the same time contracts relating to rates and many other matters were executed.

From this time UF could and did control the election of IRCA's nine directors, although it regularly allowed the banking interests to submit four nominees for its approval. UF's control was exercised even more potently by the designation, from 1928 on, of the officer in charge of its tropical operations as "special adviser" to IRCA's board, chairman and president. For many years, the extent of UF's stock ownership and dominance of IRCA was concealed.

As indicated, UF's most important interest in IRCA was in having low freight rates and special services for its own products and in denying these to its competitors. On banana shipments from western Guatemala, UF for many years paid only $60 per car, performing the wharfage service and loading at Barrios with its own labor, whereas independents paid $130 per car for the line haul and about $72 for wharfage and loading, on which IRCA made a

profit. For bananas from eastern Guatemala, UF was charged 11½ or 12 cents per stem as against 20 cents for independents. On imports through Barrios to western Guatemala IRCA charged the public $350 or more per carload as against $60, later $100, to UF. In numerous instances IRCA, at UF's instance, denied to independents services comparable to those furnished its controlling stockholder.

In May, 1948, meetings were held between an attorney representing IRCA stockholders, and the President and Chairman of the Board of IRCA, to consider IRCA-UF relations and rates. When the conferences proved unproductive, Ripley and other stockholders represented by the attorney brought a derivative action in the Supreme Court, New York County, in February, 1949. A year later the Appellate Division sustained the complaint except for such portions as related to matters occurring before February 4, 1943, which were held to be barred by the six-year statute of limitations. *Ripley* v. *International Railways of Central America,* 276 App. Div. 1006, 95 N.Y.S. 2d 871 (1st Dept. 1950). After service of an amended complaint, denial of a motion challenging its sufficiency and extensive discovery, trial was begun in 1953 before Mr. Justice Hammer and, after his retirement, was continued before him as a referee.

In a long report and decision, filed in June, 1957, the referee concluded that plaintiffs had established a breach of fiduciary duty by UF. He fixed rates for the carriage of the bulk of UF's traffic at considerably more than what IRCA had collected but less than those charged to independents.[1] Although at the trial IRCA had opposed the

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[1] For west coast bananas he directed that the $75 per car rate voluntarily made effective in January, 1948 should be applied retro-

(Footnote continued on following page)

plaintiffs and supported UF, because of fear that judgment for the plaintiffs might enable UF to terminate the complex of contracts executed in 1936, the referee's conclusion as to the severability of the rate arrangements led it to join plaintiffs in appealing on the ground that the award of damages was inadequate. The Appellate Division rejected this argument as it did the many grounds urged by UF for reversing the award to IRCA, *Ripley* v. *International Railways of Central America*, 8 A. D. 2d 310, 188 N.Y.S. 2d 62 (1st Dept. 1959), and the Court of Appeals affirmed, 8 N. Y. 2d 430, 209 N.Y.S. 2d 289 (1960). On March 1, 1961, the Supreme Court for New York County entered a supplemental judgment assessing damages for 1956-60 in the sum of $3,309,670.39, with interest.

In preparing for and conducting the trial of the *Ripley* action, an attorney for the plaintiff stockholders became aware of evidence which in his view demonstrated antitrust violations by UF, and mentioned this to a Justice Department attorney toward the end of 1951. In 1954, the United States filed a civil complaint under the antitrust laws against UF in the Eastern District of Louisiana. This action terminated early in 1958 in a consent decree,

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(Footnote continued from preceding page)

actively to January 1, 1946, that the rate for 1948 should be $80, and that this should rise $5 annually through 1955. For east coast bananas he directed that the 15⅓ cent per stem rate which had applied from 1920 to 1930 should be restored from 1943 through 1955. For import traffic he directed an increase of 10% per car for 1947 and for each year thereafter through 1955. As to other items, he found plaintiffs had not adequately proved damages. He expressed the opinion that "equity and fair dealing indicate, and no doubt will require, similar annual rateable increases" for the cross-country traffic "until the rates equal those fixed for the general public (or so-called independent), shippers." The judgment entered December 19, 1957, translated these figures into dollar amounts aggregating $4,531,055.38, including interest, established rates from January 1, 1956, in accordance with the above, and contained an appropriate reservation of jurisdiction for the future.

one section of which required UF to dispose of its IRCA stock not later than June 30, 1966. In January, 1962, UF sold substantially all such stock to BSF Company which in turn sold the great bulk of this to Trans Caribbean Airways; the latter has purchased additional stock so that it owns 340,000 of IRCA's 500,000 shares of common. Later, UF advised it was abandoning Tiquisate and would no longer ship bananas from western Guatemala over IRCA, as the latter claimed it was bound to do through 1967. IRCA then sought the advice of attorneys who had been of counsel to the *Ripley* plaintiffs. This action followed, on February 16, 1965.

We conclude this history with a summary statement of the six claims in the complaint:

First: loss of revenues and permanent damage to IRCA from UF's repressive tactics which prevented other banana shippers from using IRCA, 1928-61, $75,000,000.

Second: utilizing IRCA to facilitate UF's monopolistic designs by granting it discriminatorily low rates, 1928-61, $55,000,000 less the principal paid on the state court judgment.

Third: restricting UF's own banana shipments over IRCA, 1949-64, and disposing of its banana plantations in the Tiquisate area for other uses beginning in 1961, $24,000,000.

Fourth: monopolization of water transportation of Guatemalan coffee to the United States on a basis whereby total charges via Barrios were equalized with those from west coast ports of Guatemala and whereby IRCA was forced to charge higher rates on coffee not using UF ships, depriving IRCA of higher

rail revenues it could have obtained if there had been effective steamship competition, 1928-61, $15,000,000.

Fifth: breach of contract to ship west coast bananas (damages included in third claim).

Sixth: acquisition of control of IRCA by UF in violation of § 7 of the Clayton Act, 15 U. S. C. § 18 (damages equal to aggregate alleged in first four claims).

The total damages asserted, which may well contain some duplications, amounted to $169,000,000 and, when trebled, to $507,000,000.

II.

We consider first the defense of the four-year statute of limitations for antitrust actions, 15 U. S. C. § 15b, which Judge Ryan sustained save as to the claim for breach of contract. IRCA asserts that the statute did not start to run on any of the antitrust claims until UF relinquished its domination in January, 1962, even though most of the facts had been spread on public records long before, and that the action, brought in February, 1965, was thus timely. UF responds that "domination" as a basis for tolling the statute with respect to an antitrust claim ceases to apply to a corporation once the facts giving rise to the action have become known to independent directors or stockholders since they can bring a derivative action for treble damages on the corporation's behalf, as held in *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 202 F. 2d 731 (2 Cir. 1953). It contends that this condition was here met as to stockholders not later than the annual meeting in March, 1952, when, after a thorough and heated airing of many

of the claims being advanced in *Ripley*, an opposition slate received some 204,000 votes as against 308,000 for the management, and as to directors in 1959 when three "independent" directors were elected to the IRCA board.[2] Plaintiff, not disputing that sufficient knowledge of the claims existed long before 1961, replies that it would be anomalous to bar the corporation because of a stockholder's or director's failure to do what the former was not bound to do and what neither might be able to do. Pointing to the thirteen years of starvation diet for the stockholders' lawyers in the *Ripley* action, it stresses the serious practical obstacles to undertaking derivative litigation against a powerful defendant, particularly one controlling the corporation, without the sinews afforded by the corporate treasury.

The closest that the Supreme Court has come to dealing with this vexing problem is *Curtis* v. *Connly*, 257 U. S. 260 (1921). This was a suit in equity by the receiver of a national bank against former directors for losses sustained by the payment of dividends out of capital and by improper loans and investments. The suit was brought August 2, 1916, and the six defendants whose liability was at issue had resigned by early 1910. Mr. Justice Holmes considered the suit to have been brought "upon the common-law right of the bank to recover for acts that diminished its assets,"

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[2] The three, Cunningham, Ruckle and Yaeger, were elected May 27, 1959, and remained as directors until 1963. Ruckle, a New Jersey automobile dealer who had owned a substantial amount of IRCA stock since 1954, was invited by McGovern of UF to have his name on the management slate for 1959; so apparently was Cunningham. The record does not show the circumstances as to the nomination and election of Yaeger who had been on the opposition slate at the stockholders' meeting of 1952; however, in view of the absence of cumulative voting, it is inferable that he too was on the "management" slate even though known to be hostile to UF.

257 U. S. at 262,[3] and accordingly treated the case as governed wholly by the Rhode Island statute of limitations without considering possibly more extensive federal principles. The applicable Rhode Island statute was for six years with a proviso that "if any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against the person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence." The somewhat anthropomorphic view that "The bank, of course, must be charged with knowledge of what appeared upon its books," 257 U. S. at 262-63, disposed of the claims of concealment of illegal investments and, apparently, also of illegal dividends. The only point further discussed was the carrying of loans on the books at inflated values, as to which the "bank" itself would not perceive the error since the entries tallied with the amount of the loans and the concealment was simply the weakness of the borrower's credit. As to this, notice was found in the election of three new directors between 1909 and early 1910 who came to the board, admittedly with knowledge of the facts, "as the eyes of the bank." 257 U. S. at 264. The Supreme Court's opinion did not discuss, although those in the lower courts had, "the contention made, not with much apparent confidence, that the statute did not begin to run in favor of the retiring directors until the bank passed into the control of a board, the majority of whom had not participated in the wrongs alleged against the retiring members . . . ." *Curtis* v. *Connly,* 264 Fed. 650, 652-53

[3] We are not clear why this was so, since the bill apparently alleged acts constituting federal claims under Rev. Stat. § 5239, see the decision of the District Court, *Curtis* v. *Metcalf,* 259 Fed. 961, 963-64 (D.R.I. 1919), and *Chesbrough* v. *Woolworth,* 244 U. S. 72, 78-79 (1917), but we take the opinion as we find it.

(1 Cir. 1920); see also *Curtis* v. *Metcalf*, 259 Fed. 961, 964-66 (D. R. I. 1919). Examination of the briefs in the Supreme Court discloses that the appellant's argument on this score went not to domination as such but rather to knowledge. "Three-fifteenths of a board of directors," it was urged, "is not enough to make their knowledge tantamount to knowledge by the bank." Although the domination issue thus was raised by the facts, the Supreme Court seems not truly to have focused upon it; and while the decision must be taken into account, we do not consider it nearly so conclusive in defendant's favor as did the district judge.

The three precedents in this Court that have been cited to us[4] do not assist decision much further. In *Michelsen* v. *Penney*, 135 F. 2d 409, 415 (2 Cir. 1943), an action by depositors and a receiver of a national bank against directors, we said that "the statute is tolled while a corporate plaintiff continues under the domination of the wrongdoers," and found that to be true until the receiver's appointment. But the directors other than Penney were "legally unqualified dummy directors," see 41 F. Supp. 603, 610 (S. D. N. Y. 1941), and it was for that reason that the court, shifting at this point to a theory of concealment, concluded that "notice should not be imputed to the bank, because all these new directors were elected by the controlling Penney group, many of them were lent qualifying shares by this group, and none of them were independent

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[4] We regard *Laird* v. *United Shipyards, Inc.*, 163 F. 2d 12, 15-16 (2 Cir.), cert. denied, 332 U. S. 842 (1947), as without relevance both because of the finding that at the time of the alleged breach of duty "all parties then having any interest in the corporation were fully aware of all the facts," and because the language "Nor is the statute tolled because those alleged to have been derelict in their duty were in control of the group," clearly referred to the New York, not the federal, rule.

in any real sense." 135 F. 2d at 416, n. 2. In *Austrian* v. *Williams*, 103 F. Supp. 64 (S. D. N. Y. 1952), an action by the reorganization trustee of Central States Electric Corporation against directors and others, Judge Weinfeld found that Williams' domination of Central States, as to which see his review of the facts, 103 F. Supp. at 71-75, "was so pervasive that it effectively prevented the proper institution of actions against him and the directors liable with him." *Id.* at 115. Since this sentence was followed by the statement, "The nature and extent of the domination was such as effectively to conceal by its very existence the significant facts of the transactions under attack," it is not clear whether Williams' domination alone would have been considered enough under the circumstances, and this court's view as to the inapplicability of federal principles made it unnecessary to resolve that issue here. *Austrian* v. *Williams*, 198 F. 2d 697, 700-02 (2 Cir.), cert. denied, 344 U. S. 909 (1952).[5] In *Moviecolor Limited* v. *Eastman Kodak Co.*, 288 F. 2d 80, 88 (2 Cir.), cert. denied, 368 U. S. 821 (1961), we again recognized "adverse domination" of a corporation as a basis for tolling the statute with respect to a federal claim, and characterized it as "an exception which, though sometimes bulked with concealment, in fact rests on grounds akin to undue influence or duress." However, we were not required to mark out the boundaries of the doctrine since we found the complaint "falls far short of" alleging control by the wrongdoers.

While the parties have cited many other federal decisions going in various directions, we see little to be gained

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[5] The opinion distinguished *Michelsen* v. *Penney*, *supra*, as expounding a "federal doctrine," 198 F. 2d at 700, applicable to an action to enforce the liability of a national bank director, compare fn. 3, although the *Michelsen* opinion was by no means clear on that point, see 135 F. 2d at 415, 416, n. 2.

by detailed analysis of them.[6] Many did not have to, or at any rate did not, distinguish between domination *qua* domination, i.e., as affecting the ability to sue, and domination as effecting concealment. None involved control by a single owner, as distinguished from a majority of more or less guilty directors some of whom might decide that their liability in a suit brought by the corporation would be less than their liability for not bringing one. Almost all were actions in behalf of depositors in insolvent national banks. In some ways that point operates in favor of tolling since it seems hard to charge such creditors with the failures of knowledgeable stockholders or the delinquencies of knowledgeable and independent directors; in other ways it operates against it, because in many cases the facts were known by National Bank Examiners, "the real 'eyes of the bank' " and the Comptroller of the Currency could "compel restitution, resignation, or a receivership." *Hughes* v. *Reed,* 46 F. 2d 435, 442 (10 Cir. 1931).

One principle emerging with some clarity is that a plaintiff who seeks to toll the statute on the basis of domination of a corporation has the burden of showing "a full, complete and exclusive control in the directors or officers charged." *Payne* v. *Ostrus,* 50 F. 2d 1039, 1042 (8 Cir. 1931). Such control was found, for example, in *Adams* v. *Clarke,* 22 F. 2d 957 (9 Cir. 1927), where all the directors were accused of wrongdoing and held a majority of the capital stock, and also in our *Michelsen* case, *supra.* This principle must mean at least that once the facts giving rise to possible liability are known, the plaintiff must effec-

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[6] A goodly number are cited in an elaborate footnote to the opinion in *Michelsen,* 135 F. 2d at 416 n. 2. However, Judge Clark's law clerk failed him in one respect; the cases, other than *Curtis* v. *Connly,* cited in support of the first sentence should be transposed to the second, and those cited under the second sentence should be transposed to the first.

tively negate the possibility that an informed stockholder or director could have induced the corporation to sue. And here we think IRCA fails.

While the odds may have been against the likelihood that IRCA's board of directors would have authorized an antitrust action against UF between May 1959 and February 1961, the possibility can by no means be dismissed as negligible. By that time, only four of the old-time directors remained. One of the replacements, Yaeger, would have been highly responsive to a stockholder's demand, see note 2, *supra,* and this also seems likely as to two others, Ruckle and Cunningham.[7] Nor can we simply assume that the other directors would have been obdurate. While plaintiff cites the Referee's excoriation of the IRCA directors with whom he was concerned,[8] the very vigor of that then recent expression, its affirmance by the New York courts, the 1958 decree of divestiture in the Government's antitrust suit, and the legal implications of arbitrary refusal to bring an apparently justified suit would hardly have escaped the minds of the directors, and certainly not of counsel to whom they would surely have referred a stockholder's or director's request. See Baker & Cary, Corporations, Cases and Materials 470-71 (1959); cf. *Wolf* v. *Barkes,* 348 F. 2d

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[7] Ruckle regularly gave information to aid Price, another IRCA stockholder elected a director in 1961, in a derivative suit claiming interference by UF with a program of dieselization of IRCA. The record also shows that in 1959 Ruckle, Cunningham and Price met with the attorney for Ripley to discuss the railroad's operation.

[8] "It is difficult to consider with patience the lack of information, inquisitiveness, of prudent care, and of concern of these directors and principal managers of IRCA as testified to by themselves in respect of the very important items of rates and contracts and dealings between their own company, IRCA, and its principal customer-shipper, U. F. Co. These men, it is found, were otherwise as U. F. Co. states it 'upright and honorable men' of high standing and unblemished reputation. * * *"

994, 996 (2 Cir.), cert. denied, 382 U. S. 941 (1965). In this connection, we find considerable significance in the changed position taken by IRCA in the *Ripley* action where in 1958, after the Referee's decision, it urged that the judgment "should be supported and increased," to reflect the full difference between the rates to UF and to independents. While this could be dismissed as cheap insurance for the directors with no real harm to UF since IRCA was merely supporting a position the plaintiff-stockholders were taking anyway, it is equally reasonable to regard it as meaning that the directors, even before the election of the three independents, had come to recognize their duty to protect the corporation once the spectre of loss of the UF contracts had been dissipated. Taking everything into account,[9] we cannot conclude that a demand on the IRCA directors for the institution of a treble damage action between May 1959 and February 1961 by a stockholder or director would necessarily have been fruitless.[10] UF's control of IRCA thus was no longer "full, complete and exclusive" in the

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[9] The directors also could not have overlooked the risk of dislodgment despite UF's large stock interest. In the 1952 election, five years before the Referee's findings in *Ripley*, the management slate received the votes of only some 51,000 shares other than the 256,000 owned by UF, the independents got some 204,000, and about 89,000 shares, or nearly 15% did not vote. In an election that would have been featured by cries as to the majority's refusal to authorize a multi-million dollar suit against UF arguably called for by the *Ripley* findings and with no risks save the expense of litigation, a considerably larger total vote and an even greater proportion against the UF slate would have been likely. With 95% of the stock voting, UF would have had to retain the suffrage of 29,000 of the independent shares to prevail. Even assembling a respectable management slate would not have been easy under the circumstances.

[10] While this issue is one on which plaintiff might have been entitled to take evidence, it raised no objection either in the district court or here to disposition of UF's motion on the affidavits and records submitted, and it has not adverted to any further evidence that might be introduced on this point.

sense here relevant.[11] We thus leave for another day the more difficult question whether or under what circumstances the mere possibility of suit by an informed stockholder or director would end tolling due to "domination" of a corporation by the alleged wrongdoer.

In upholding the partial defense of limitations in this case, we are thoroughly mindful that "the treble-damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute," *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358, 365 (9 Cir. 1955), and "for the purpose of multiplying the agencies which would help enforce the antitrust laws and therefore

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[11] IRCA cites *Delaware & Hudson Co.* v. *Albany & Susquehanna R.R.*, 213 U. S. 435 (1909), which held that shareholders could bring a derivative suit without making the prior demands on management and the shareholders then required by Equity Rule 94 where a majority of the corporation's directors were officers or directors of the corporation alleged to have inflicted the injury and the latter owned 22.9% of the injured corporation's stock. It argues that the question in that case was whether the plaintiffs could reasonably assume that management itself would not bring a suit in the corporation's interests when a majority of the board of directors was controlled by the prospective defendant; that the Supreme Court held in the affirmative; and that the question in this case is the same. Quite apart from the important distinction that only one of IRCA's directors in 1959 was an officer or director of UF, the problems are dissimilar. The basis for barring a derivative suit without prior demand is simply the lack of reason for such an action if the corporation is willing to sue itself, a principle adopted for the benefit of the very corporation that will profit from successful prosecution of the suit. We here enforce the important policy of the statute of limitations in protecting a defendant from stale claims; a court should require a clear showing before applying a judicially created exception. Although the question asked in the two situations thus may be formally the same, a plaintiff must go further in negating the possibility of suit by the corporation in the situation here *sub judice* since tolling the statute of limitations is far stronger medicine than dispensing with a demand as a condition to the bringing of a derivative action and will impinge upon different interests.

make them more effective." *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F. 2d 891, 893 (5 Cir. 1954), cert. denied, 348 U. S. 912 (1955). See *United States* v. *Borden Co.*, 347 U. S. 514, 518 (1954). But one may well question how far these policies would be furthered by a rule that would often permit the collection of treble damages accruing over decades and thus might seem rather an overkill.[12] Moreover, the statute of limitations itself embodies a strong policy "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348-49 (1944). There could hardly be a better case for enforcing the policy than this, where UF has already suffered two judgments for its misdeeds and recovery of damages for more than three decades would result in a huge windfall to most of the present stockholders of IRCA and an unexpected loss to many innocent ones of UF.[13]

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[12] Indeed, disregard of the statute of limitations might impede efforts by the Government to obtain divestitures by consent. If UF had retained its stock ownership in IRCA, it would have shared *pro tanto* in any recovery from itself; a controlling stockholder may well be reluctant to sell, at a price reflecting only usual business considerations, if the corporation under new ownership can recover treble damages reaching over decades. And there is surely some anomaly in a doctrine whereby, although there could be no recovery against a former 100% stockholder, and a present 90% stockholder would suffer to the extent of only 10% of the amount recovered in a derivative action, 100% damages without limit of time could be obtained after a 90% stock interest was divested at a price in no way reflecting the claim.

[13] Recovery of the damages sought, without taking account of income taxes, would amount to some $845 for each share of IRCA, and to some $62 per share of UF, currently selling around $31.

(Footnote continued on following page)

Since IRCA has not met its burden of demonstrating that, after the election of the three independent directors in 1959, UF had such "full, complete and exclusive control" as to rule out the possibility of a corporate suit against it, on the demand of a stockholder or director, for antitrust violations the facts giving rise to which had become well-known, any tolling of the statute ended at least by that time. In consequence the District Court properly held that all claims under the antitrust laws arising prior to Febuary 16, 1961, were barred by limitations.

III.

Our holding on the statute of limitations reduces the importance of the branch of UF's motion based on the rule against splitting a cause of action almost but not entirely to the vanishing point. With all claims prior to February 16, 1961, save so much of the fifth as concerns breach of contract,[14] barred by the four-year statute, the only remaining ones that would be excluded by the splitting rule are the antitrust claims relating to the period between that date and the dissipation of the effects of UF's control consequent on the sale of its stock in Janu-

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(Footnote continued from preceding page)

While the *ad damnum* may be on the optimistic side and income taxes and deductions would cut the amounts roughly in half, the figures remain huge. Yet 68% of the common stock of IRCA is owned by a recent purchaser, and some notion as to how few of the minority stockholders date back to an early period is conveyed by the fact that of the 26 plaintiffs in the *Ripley* action, brought in 1949, only two had acquired their stock before 1945.

[14] Although the District Court's judgment dismissed so much of the third and fifth claims as related to matters occurring before February 16, 1961, "on the ground of *res judicata*," this direction as to the fifth does not accord with the language or theory of the opinion, see 254 F. Supp. at 239.

ary 1962. Moreover, the second claim may have scant practical application to that relatively recent period in view of the provisions for rate increases in the *Ripley* judgment.

Starting from the doctrine that a plaintiff must recover all damages arising from given operative facts in a single action, Restatement, Judgments, § 62, defendant contends that the facts relied on by IRCA for recovery under the antitrust laws in this action are the same as those sued on by its stockholders in *Ripley*. Plaintiff disputes this; it claims that the rule against splitting is inapplicable when the first suit was brought in a forum which lacked power to give the relief sought in the second, thereby distinguishing such cases as *Williamson* v. *Columbia Gas & Elec. Corp.*, 186 F. 2d 464 (3 Cir. 1950), cert. denied, 341 U. S. 921 (1951), *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 295 F. 2d 362 (5 Cir. 1961), and *Engelhardt* v. *Bell & Howell Co.*, 327 F. 2d 30 (8 Cir. 1964); and it argues that in no event should the rule be applied when a forum without power to give full relief was chosen not by the corporation now plaintiff but by stockholders forced to act in its behalf because of an unwillingness to sue dictated by the defendant, especially when they were ignorant of antitrust violations when the suit was brought.[15]

On the point of fact raised by the argument, the situation seems as follows: The gravamen of the *Ripley* complaint was the unduly and discriminatorily favorable rates accorded UF on its own shipments (the claim asserted as Second in the instant action) and the rate divisions on coffee exports and commodity imports; nothing in it can

[15] Plaintiff also argues that when the *Ripley* action was brought in 1949, we had not yet decided *Fanchon & Marco*, *supra*, 202 F. 2d 731, holding that derivative actions for violations of the antitrust laws would lie, but we do not consider that point to have substance.

fairly be read as raising the claims now asserted as First or Fourth, and the Sixth is a different ground for the damage claims previously asserted. The proof, however, appears to have taken a wider range and the Referee made many findings relevant to what are now the First and Fourth claims, although he repeatedly made clear,[16] as did the New York Court of Appeals, that claims for violations of the antitrust laws were not at issue. See 8 N. Y. 2d at 446, 209 N. Y. S. 2d at 300. The *Ripley* plaintiffs did not seek a judgment for the loss of the traffic of independents. While they did request judgment in excess of $8,000,000 for unfair divisions on export traffic, the Referee declined to grant any, evidently considering that the proof showed only that IRCA had been forced to reduce its own rates to meet truck competition.

To support its position that the action in the New York courts, which lack power to grant relief under the antitrust laws, could not preclude a later federal treble damage suit, plaintiff relies heavily on Judge L. Hand's well-known holding, in *Lyons* v. *Westinghouse Elec. Corp.*, 222 F. 2d 184 (2 Cir.), cert. denied, 350 U. S. 825 (1955), that a state court's overruling of an antitrust defense would not bar a federal suit for treble damages brought by the state court defendant. Defendant distinguishes this, as did the district judge, 254 F. Supp. at 237-38, on the basis that there it was the antitrust defendant, not the antitrust plaintiff, who invoked the state forum. Defendant further asserts that, whatever may be thought of plaintiff's distinction of *Williamson* and the other cases cited above, this cannot explain away our old decision in *Straus* v. *American Publishers' Ass'n*, 201 Fed. 306 (2 Cir. 1912), appeal dismissed, 235 U. S. 716 (1914). Straus had first sued in a New York

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[16] At the instance of counsel for UF, the Referee sustained objections to arguments and evidence which were relevant only to antitrust violations and not to breaches of fiduciary duty.

court under the state and federal antitrust laws for an injunction and damages with respect to an agreement to fix prices of books, and the Court of Appeals had held the agreement valid as to copyrighted although not as to uncopyrighted works. While Straus' appeal to the Supreme Court was pending, he sued in the district court under the federal antitrust act alone. This court held the state judgment conclusive, the opinion saying in one breath that the state court was without jurisdiction of the complaint founded on the federal statute and in the next that the "question was actually involved in the cause before the state court, which was competent to decide it." The Supreme Court later reversed the New York judgment on the merits, 231 U. S. 222 (1913), making a remark equally hard for modern ears to understand: "This view of the case renders it unnecessary to decide whether an original action can be maintained in the state courts seeking an injunction and to recover damages under the Sherman Law." 231 U. S. at 237.

The *Straus* case is not directly in point since it held the federal plaintiff barred not by failure to assert a federal claim in the state court but by the state judgment against him upon it. Even as to that, however, Judge L. Hand overruled *Straus* in denying a petition for rehearing in *Lyons, supra;* 222 F. 2d at 195. We think it was well overruled even though, as defendant urges, it perhaps did not need to be in order to support the *Lyons* result.

Since what *Lyons* said in overruling *Straus* would necessarily mean that a judgment in favor of a state court defendant in an action seeking relief under the federal antitrust laws would not bar a subsequent federal suit,[17]

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[17] We do not deal here with a case where the jurisdiction of the state court was challenged and upheld by it, albeit erroneously. See *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939); *Alleghany Corp.* v. *Kirby*, 340 F. 2d 311, 312 n. 1 (2 Cir.), cert. granted, 381 U. S. 933 (1965), dismissed, 384 U. S. 28 (1966).

it does seem hard to understand how a plaintiff's successfully suing in a state court on a claim that might have been but was not made the basis for antitrust relief can have a larger effect. Compare Restatement, Judgments, § 62, Comment on Clause (a), p. 255.[18] We find it unnecessary to decide this, however, since our ruling as to the statute of limitations brings the case to us in a posture, generally limited to damages suffered after February 16, 1961, quite different from that in which the issue was considered by the district judge. "On the whole, the principle against splitting is a salutary doctrine" but "inflexibly applied there can be little doubt that it results at times in unwarranted hardship." 1B Moore, Federal Practice ¶ 0.410[2] at 1169 (2d ed. 1965). It surely was not incumbent on the stockholders who brought the *Ripley* action in 1949 to recover all damages IRCA might sustain until the end of time from acts of UF of the sort there attacked, even those incurred after the period, through 1960, as to which proof of damages was made. Indeed, if the prior judgment had been in a federal treble damage suit by the corporation, it would not preclude recovery for subsequent antitrust violations. *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322 (1955). The complaint should therefore not have been dismissed as to claims within the appropriate period of limitations

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[18] Section 62k of the Restatement suggests that where the plaintiff sues in a court whose sovereign cannot or has not made available a court which can afford the plaintiff relief for his entire cause of action, there is no bar to a subsequent suit on the unredressed portion of that cause of action in the court of another sovereign which does afford such relief. This seems much closer to the case at bar than the rule of § 62j, relied on by the district judge, 254 F. Supp. at 238, which deals with a prior suit brought in a court of limited jurisdiction where the sovereign has made available another court with jurisdiction to grant all the relief sought.

IV.

Plaintiff's appeal from the denial of its motion for partial summary judgment is without merit. Since the *Ripley* complaint did not and could not properly have asserted a claim under the federal antitrust laws, the judgment cannot have adjudicated that UF violated them; on this point the overruling of *Straus, supra,* 201 Fed. 306, by *Lyons, supra,* 222 F. 2d 184, works for the defendant. The utmost effect the prior judgment could have had in this action on any view would thus have been as an estoppel on questions of fact actually litigated; and we need not now decide how far it would even have that. See Restatement, Judgments, §§ 68 and 71, and *Lyons, supra,* 222 F. 2d at 195-96. With this action limited to damages after February 16, 1961, save on the contract claim which plaintiff does not contend to have been considered in *Ripley,* the role of the findings and judgment in the prior action is even more limited.

The judgment is affirmed insofar as it barred claims for damages under the antitrust laws accruing before February 16, 1961, is reversed insofar as it went beyond this, and is affirmed insofar as it denied plaintiff's motion for partial summary judgment. No costs.

APPENDIX B

Judgment of Court of Appeals, Dated and Entered January 27, 1967.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of January, one thousand nine hundred and sixty-seven.

Present: HON. J. EDWARD LUMBARD,
Chief Judge,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Plaintiff-Appellant,

v.

UNITED FRUIT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Judgment of Court of Appeals, Dated and Entered January 27, 1967.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court denying plaintiff's motion for partial summary judgment be and it hereby is affirmed.

It is further ordered, adjudged and decreed, that the order granting defendant's motion be and it hereby is affirmed in part and reversed in part in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

Statutes.

15 U.S.C. § 1, provides in pertinent part, as follows:

"TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL . . . PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 2:

"MONOPOLIZING TRADE A MISDEMEANOR; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 8:

"TRUSTS IN RESTRAINT OF IMPORT TRADE ILLEGAL; PENALTY

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy,

illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months."

15 U.S.C. § 15:

"SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Statutes.

15 U.S.C. § 15b:

"LIMITATION OF ACTIONS

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

15 U.S.C. § 18 (1946 ed.) prior to its amendment in 1950, provided in pertinent part, as follows:

"ACQUISITION BY ONE CORPORATION OF STOCK OF ANOTHER

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"This section shall not apply to corporations purchasing such stock solely for investment and not using

the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

"Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything hereto-

fore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided. . . ."

28 U.S.C. § 1738:

"STATE AND TERRITORIAL STATUTES AND JUDICIAL PROCEEDINGS; FULL FAITH AND CREDIT

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

APPENDIX D

Rule 9 (g) of the General Rules of United States District Court for the Southern District of New York.

9. (g) Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

APPENDIX E

Excerpt From United's Brief in United States Court of Appeals (October 24, 1966).

"We may concede for present purposes (as *Ripley* determined) that United dominated Railways to such an extent as to become accountable to Railways on a fiduciary basis. We may even concede for present purposes that the degree of 'domination' found in *Ripley* may have been sufficient to prevent Railways from bringing an action in its own name, as the Appellate Division pointed out in the quotation at appellant's br. 45-6.*

* "It is equally obvious here that demand upon the directors of IRCA to sue UFCo, in connection with the acts and transactions complained of in the instant action, would have been a useless and futile act. (*Sage* v. *Culver,* 147 N. Y. 241, 246; *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.,* 213 U. S. 435, 451.) No fair and honest consideration of such a demand could have been anticipated under the circumstances; nor could there be *any reasonable expectation of any just and vigorous prosecution of a suit. The IRCA board was under the influence of UFCo with respect to the causes of action which could be asserted against UFCo.* . .

* "Where an antagonistic position is demonstrated, stockholders have the right to remove the matter from the hands of management and bring an action in a representative capacity. (*Chaplin* v. *Selznick,* 186 Misc. 66, 68.) Since futility of demand was shown by the evidence establishing interest or bias on the part of the directors, plaintiffs were entitled to proceed with the action. *Surely, we would not compel them to entrust the prosecution of such an action in the hands of persons who would be opposed to the success of the suit.*" (Italics supplied)

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* Quotation from Appellant's Brief, pp. 45-6.

APPENDIX F

Excerpt From United's Reply Brief on Its Motion for Summary Judgment in the United States District Court (June 23, 1965).

"If we adopt the rule that the presence of one or more independent minority directors is sufficient to stop the tolling of the statute, the undisputed fact (as demonstrated by the Railways' corporate records and the supplemental Carson affidavit sworn to June 18, 1965) is that from at least 1959 onwards there were not one but three independent directors of the Railways: George A. Ruckle, James B. Cunningham and Louis Yaeger, whose interests and activities were directly antagonistic to United Fruit . . ."

SUPREME COURT, U. S.

APR 25 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1217

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, *Petitioner,* —*against*— UNITED FRUIT COMPANY, *Respondent.*	No. 1217

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent-defendant United Fruit Company (*"United"*) opposes the petition of International Railways of Central America (*"Railways"*) for certiorari to review the decision of the United States Court of Appeals for the Second Circuit. In affirming upon the ground of the statute of limitations the District Court's (Ryan, Ch. J.) grant of partial summary judgment in favor of United, the Court of Appeals reversed in part and in part did not reach the second ground, the rule barring splitting of claims, upon which the District Court's judgment was also based. Should this Court grant this petition, we submit it should have fully before it both bases of the District Court's judgment and be in a position to modify the Court of Appeals' judgment. Accordingly, in No. 1320, United has cross-petitioned for a writ of certiorari, to be granted only in the event the Court grants the petition in No. 1217. Our request that the Court deny the petition herein (No. 1217)

rests on the grounds first, petitioner's claim concerning the statute of limitations is without merit and does not warrant review by this Court, and second, the judgment of the Court of Appeals must in any event be sustained on the alternative ground of the rule against splitting claims, discussed in full in United's cross-petition in No. 1370.

Question Presented

Where representatives of the plaintiff, including its stockholders at a regularly convened stockholders' meeting, counsel for minority stockholders, and independent members of the board of directors, were advised of the circumstances underlying petitioner's claims and such stockholders actually instituted separate suits on the same facts but different legal theories more than four years before the filing of this action, was it error for the courts below to apply the four-year statute of limitations (15 USC § 15b) in dismissing so much of those claims as accrued before February 16 1961?

Statutes Involved

The pertinent statutes are §§ 1 and 2 of the Sherman Act (15 USC §§ 1 and 2) and §§ 4b and 7 of the Clayton Act (15 USC §§ 15b, 18); said statutes are reproduced at pp. 26a-30a of Appendix C to the petition herein.

Statement of Case

On February 16 1965 Railways brought this action asserting, in its amended complaint, six causes of action. Five are for treble damages under the antitrust laws. One (the fifth) is for alleged breach of contract. The total trebled damages claimed are $507,000,000. After pretrial discovery, United moved for partial summary judgment to dismiss a majority of Railways' claims and Railways cross-moved for partial summary judgment on the same claims.

Both motions were based broadly upon the prior *Ripley* litigation in the New York State courts. United's motion was based upon (a) the rule against splitting of claims and (b) the statute of limitations with respect to matters accruing more than four years before the filing of the complaint.

Railways' cross-motion was based upon the theory that as to substantially all of the claims (except the fifth, for breach of contract) the facts were found in its favor in *Ripley* and that defendant is estopped from denying those claims.

The District Court granted United's motion on both grounds asserted and denied Railways' cross-motion. Railways appealed and the Court of Appeals for the Second Circuit affirmed the judgment below, on the ground of the statute of limitations, insofar as it barred claims accruing more than four years prior to the commencement of this action, *i.e.* before February 16 1961. That Court therefore found it unnecessary to consider whether the rule against splitting of claims also barred Railways' claims accruing before February 16 1961. However, the Court of Appeals went on to consider whether such rule barred claims accruing after February 16 1961, and finding that such claims were not barred it reversed the decision below to the extent that it barred claims accruing after February 16 1961.

1. *Ripley* v. *International Railways of Central America and United Fruit Company* 8 AD 2d 310, aff'd 8 NY 2d 430

The Court of Appeals succinctly described the events immediately preceding the *Ripley* litigation (App. 5a):[1]

> "In May, 1948, meetings were held between an attorney representing IRCA stockholders, and the

[1]References such as above are to the opinion of the Court of Appeals appended at pp. 1a-23a to the petition herein.

President and Chairman of the Board of IRCA, to consider IRCA-UF relations and rates. When the conferences proved unproductive, Ripley and other stockholders represented by the attorney brought a derivative action in the Supreme Court, New York County, in February, 1949."

This was a minority stockholders' action commenced on behalf of Railways by stockholders, ultimately numbering 27, alleging domination and control of Railways by United, which at that time owned approximately 42% of the stock of Railways and alleging abuse by United of its resultant fiduciary obligations through under-payment of freight rates and in other ways summarized in the moving affidavit of Porter R. Chandler (par. 7; I—29a-30a).[2]

Four of the six attorneys who now represent Railways before this Court appeared and participated actively for Railways' stockholders throughout the *Ripley* case[3] which resulted in a judgment for the benefit of Railways of $4,531,055.38 as of January 2 1958. This judgment together with interest and future payments provided for, caused United to pay to Railways $9,139,596.42 on March 1 1961, and thereafter additional amounts (which are still being paid) by virtue of the increased scale of charges fixed by the court (I—30a). The immense scale of the *Ripley* trial was noted in Judge Ryan's opinion (I—6a, 9a-10a) and is set forth in pars. 8 and 9 of the Chandler affidavit (I—30a-32a). After judgment the successful plaintiffs' attorneys demanded an allowance of $8,940,600 as compensation for their services. Of this enormous sum

[2]References such as above are to Roman numbered volumes of Railways' appendix in the Court of Appeals and the pages therein.

[3]They are Messrs. Lewittes, Leventritt, Bush and Bender. A fifth member of Railways' present counsel (Mr. Abraham K. Weber) was substituted as attorney of record for Railways in the *Ripley* case itself on January 10 1961.

$5,175,000 was requested by the group of attorneys of which some of the present attorneys for Railways were members—a demand ultimately cut down by the courts to $1,500,000 (I—32a).

2. The Present Litigation

The Court of Appeals (App. 6a) thus described the circumstances leading to the commencement of the present litigation:

> "In preparing for and conducting the trial of the *Ripley* action, an attorney for the plaintiff stockholders became aware of evidence which in his view demonstrated antitrust violations by UF, and mentioned this to a Justice Department attorney toward the end of 1951. In 1954, the United States filed a civil complaint under the antitrust laws against UF in the Eastern District of Louisiana. This action terminated early in 1958 in a consent decree, one section of which required UF to dispose of its IRCA stock not later than June 30, 1966. In January, 1962, UF sold substantially all such stock to BSF Company which in turn sold the great bulk of this to Trans Caribbean Airways; the latter has purchased additional stock so that it owns 340,000 of IRCA's 500,000 shares of common. Later, UF advised it was abandoning Tiquisate [its plantation in western Guatemala] and would no longer ship bananas from western Guatemala over IRCA, as the latter claimed it was bound to do through 1967. IRCA then sought the advice of attorneys who had been of counsel to the *Ripley* plaintiffs. This action followed, on February 16, 1965."

In addition to the attorneys for the *Ripley* plaintiffs, it should be noted that another of the Railways' present

attorneys (Mr. Weber) had represented Railways directly since January 10 1961, and had been its attorney of record in the closing stages of the *Ripley* case, including the entry of the final *Ripley* judgment and the extended hearings which followed on the fee applications in that case.

The present amended complaint charges, in substance, that the same acts which were claimed as breaches of fiduciary duty in *Ripley* also constituted violations of the antitrust laws (except for the fifth claim; II—31-2, which is for breaches of contract, some of which are said to have occurred after the *Ripley* decision). It asks total treble damages of $507 million, less a credit for the $9 million-odd paid under the *Ripley* judgment.

On the basic identity of the present case with *Ripley*, Judge Ryan found (I—11a):

> "We find that the facts presented to the New York court in the Ripley case were substantially the same as those presented by this litigation."

3. Antitrust Claims Arising in *Ripley*.

On the specific question of the antitrust claims in *Ripley* Judge Ryan found (I—10a):

> "A review of the Ripley record reveals that the New York Court did not consider or rule upon the Federal antitrust violations alleged in the present action for the purposes of determining whether any such violations were present. Nevertheless, the facts on which a federal court might have made such a finding were before the Court."

As illustrations, he then quoted specific references to alleged monopolistic and anti-competitive practices from the *Ripley* pleadings and the Referee's Report (I—10a-11a). Indeed, Railways in its petition before this Court provides

numerous instances of alleged antitrust violations found in the *Ripley* record (Pet., pp. 7-14).

In affirming Judge Ryan on the basic identity of the facts before the New York courts and the claims before this Court, the Court of Appeals held, per Friendly, J. (App. 19a-20a):

> ". . . The gravamen of the *Ripley* complaint was the unduly and discriminatorily favorable rates accorded UF on its own shipments (the claim asserted as Second in the instant action) and the rate divisions on coffee exports and commodity imports; nothing in it can fairly be read as raising the claims now asserted as First or Fourth, and the Sixth is a different ground for damage claims previously asserted. The proof, however, appears to have taken a wider range and the Referee made many findings relevant to what are now the First and Fourth claims, although he repeatedly made clear, as did the New York Court of Appeals, that claims for violations of the antitrust laws were not at issue."

4. Railways' Knowledge Circa 1950 of Alleged Antitrust Violations

At the outset we emphasize that no question of tolling by reason of fraudulent concealment[4] is here involved. At the argument in the District Court, Railways' counsel thus formulated the issue:

> "We are not claiming tolling of the statute of limitation because of concealment. We are claiming toll-

[4]The two cases cited in the footnote to the petition herein at p. 26 (*Kansas City, Missouri* v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (CA 8 1962) and *Westinghouse Electric Corp.* v. *Pacific Gas & Elec. Co.*, 326 F. 2d 575 (CA 9 1964)) were both fraudulent concealment cases.

ing of the statute of limitations for the entirely separate ground of adverse domination of International Railways of Central America by the United Fruit Company."

The moving affidavit of Porter R. Chandler (I—26a, et seq.) and the deposition of M. Victor Leventritt (D. App. 1a-48a)[5], one of petitioner's principal lawyers both in *Ripley* and here, demonstrate the widespread knowledge among Railways' lawyers and stockholders of alleged antitrust violations by United.

The first of the minority stockholders who sought counsel and ultimately obtained representation by Railways' present attorneys in *Ripley* complained as early as March 29 1950 at the Railways' stockholders' meeting of "restraint of trade" by United in Guatemala with respect to the banana traffic (I—35a). In describing his services in the *Ripley* case Mr. Berner, chief of the staff of which petitioner's present attorneys were members, declared that he considered it his "duty as general counsel to press any legitimate claims of the railroad" (I—32a). He went on to illustrate the restraints of trade, discriminatory practices, and attempted domination of Guatemalan production which he brought out in *Ripley* and which are the main theme of the present action (I—35a, et seq.). Numerous findings both sought by and granted to *Ripley* plaintiffs on behalf of Railways, as set forth at I—36a, et seq. are redolent of the antitrust violations which are again charged in the present amended complaint. Decisions in the antitrust field were proffered by the *Ripley* plaintiffs to the court (I—39a).

More importantly, Mr. Leventritt admitted on deposition in the case at bar that the matter of prosecuting on

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[5]References such as above are to United's appendix in the Court of Appeals.

behalf of Railways the alleged antitrust violations of United came up at some time in the long history of *Ripley*. At D. App. 26a-27a he said:

> "Q. Did you think as a participant in the Ripley case during its preparation and trial, that antitrust violations by the defendant United Fruit existed?
>
> A. Yes.
>
> Q. Did you give consideration as to whether recovery could be made in the Ripley case in the State Court for those antitrust violations?
>
> A. I think we did.
>
> Q. What conclusion did you reach?
>
> A. According to my recollection, we concluded that the proper forum for such an action was the Federal Court rather than the State court.
>
> . . . . .
>
> I was asking you, Mr. Leventritt, as a lawyer in the *Ripley* case, *whether you gave consideration and your colleagues gave consideration to the point.*
>
> MR. BENDER: Gave consideration to what?
>
> MR. CARSON: *To advising your clients to bring the antitrust claim at that time in the Federal Courts.*
>
> A. I think we did." (Emphasis added)

The evidence on this subject was summarized, and additional items of Mr. Leventritt's deposition were cited by Judge Ryan at I—16a:

> "The exhibits presented to the Court indicate that the *Ripley* plaintiffs had knowledge of the antitrust violations some time before 1953. At least some of the attorneys for the present plaintiff also represented the plaintiffs in *Ripley*. M. Victor Leventritt, Esq., is one of the attorneys who participated in the *Ripley* litigation for the plaintiffs and

> is one of the leading attorneys for the plaintiff in this suit. He has indicated that he and his associates had concluded at least by 1953 'that the United Fruit had committed various violations of the antitrust laws in relation to the subject matter of the *Ripley* action (p. 47 deposition of M. Victor Leventritt [D. App. 29a]. Furthermore, he testified to having suggested to a member of the Antitrust Division of the Department of Justice that they 'could very easily prove a case against the United Fruit Company' (Id. p. 67) [D. App. 40a]. Surrounding circumstances indicate that this suggestion was made some time in December 1951."

The Court of Appeals affirmed these findings (App. 6a).

5. The 1952 Railways' Stockholders' Meeting

At the 1952 annual meeting of Railways' stockholders (some three years after the *Ripley* case had been started, over a year before the *Ripley* trial started, and almost 13 years before the filing of the present amended complaint) the *Ripley* plaintiffs and their supporters conducted a highly publicized proxy fight against United. This proxy fight is referred to as follows in plaintiffs' Finding B143 in the *Ripley* case (II Ripley Record ff. 132, appearing also at III—35a):

> "B143. In 1952, when an opposition slate of directors were proposed by independent stockholders of IRCA, the publicly-held stock was voted 4 to 1 in favor of that slate; United's shares were still a majority of those voted and the opposition slate was defeated.
>
> REF. PX 679A (IRCA Minutes Annual Meeting 3/26/52)."

Plaintiffs' Exhibit 679A in *Ripley*, cited by plaintiffs in support of this finding, is the transcript of the annual meeting of Railways' stockholders held on March 26 and 27 1952, a copy of which is included in United's appendix in the Court of Appeals, pp. 56a-130a. The meeting was attended by three attorneys representing various *Ripley* plaintiffs, all of whom repeatedly aired their views on the controversies involved in the present case.

It was also attended by at least four of the *Ripley* plaintiffs, two of whom likewise spoke repeatedly and questioned the management on various aspects of those controversies. The whole tenor of the meeting was an extended attack by a large group of Railways' stockholders upon United, based upon all of the grounds now asserted in the case at bar.

District Judge Ryan found as follows concerning the 1952 stockholders' meeting (I—20a-21a):

> "In fact, one of the independent directors was on a slate of directors proposed by and including several *Ripley* plaintiffs at the 1952 IRCA annual meeting of stockholders. This slate, which was defeated in 1952 after a bitterly contested proxy fight, had the overwhelming support of the stockholders other than United. The bitterness of the meeting, the publicity of the proxy fight, the support given to the opposition slate of directors and the number of named plaintiffs in the *Ripley* suit are all factors which indicate that there was widespread knowledge among IRCA stockholders of United's wrongdoings."

The Court of Appeals affirmed these findings (App. 9a) and found petitioner "not disputing that sufficient knowledge of the claims existed long before 1961."

6. The *Henis* Litigation

Mr. Leventritt was also familiar with the institution of a separate action on some of the same claims as were involved in *Ripley,* brought by one of the *Ripley* plaintiffs and another Railways stockholder against United's subsidiary Compania Agricola in the United States District Court of Delaware on March 30 1953 (D. App. 30a-34a) referring to *Henis* v. *Compania Agricola,* 116 F. Supp. 223, aff'd, 210 F. 2d 950 (CA 3 1954): *cf.* Chandler affidavit (I—33a-34a).

The *Henis* complaint involved, *inter alia,* an attack on the 1936 acquisition by Agricola of the same 185,000 shares of Railways' stock which is now attacked as a violation of the Clayton Act in paragraphs 20 and 80 of the present amended complaint (II—9, 33). Thus, during the pendency of the *Ripley* proceedings, one of the *Ripley* plaintiffs actually exercised his right to go into a Federal court having jurisdiction over antitrust claims.

7. Independent Railways' Directors

The record amply proves (I—127a-132a), petitioner concedes (Pet. pp. 18-19), and the District Court (I—20a-21a) and the Court of Appeals (App. 9a-14a) found that in 1959 three directors were elected to the board of directors of Railways who were independent of United and not dominated or controlled by it in any way. They were Messrs. Yaeger[6]—presently Chairman of the Board and President of Railways—Cunningham and Ruckle. The Court of Appeals found (App. 14a (n. 7)):

> "Ruckle regularly gave information to aid Price, another IRCA stockholder elected a director in 1961,

[6]Note 2 to the Court of Appeals opinion at App. 9a erroneously implies that Mr. Yaeger left the Board in 1963. It is undisputed that he is still a member.

> in a derivative suit claiming interference by UF with a program of dieselization of IRCA. The record also shows that in 1959 Ruckle, Cunningham and Price met with the attorney for Ripley to discuss the railroad's operation."

Moreover, Ruckle gave inside information of the proceedings of Railways' board meetings not only to Price, but also to Sidney Bender, Esq., a member of the staff of the general counsel for the *Ripley* plaintiffs and now of counsel for the petitioner herein (I—129a).

As to the independence of these directors the District Court held (I—20a):

> "In the present suit, there can be no dispute that at least one and probably three independent directors have served on the board of directors of IRCA since 1959."

The Court of Appeals affirmed (App. 9a, 14a).

Manifestations of the independence of Railways' board were apparent almost a year before the election of Messrs. Yaeger, Cunningham and Ruckle in May 1959. Indeed, by notice of appeal dated January 15 1958 (I Ripley Record ff37-41) Railways appealed Referee Hammer's report and decision in *Ripley* "on the ground of inadequacy of the damages awarded" (I—94a) to Railways. The position of the management of Railways *at that time* is stated in its brief dated July 3 1958 filed on its appeal to the New York Supreme Court, Appellate Division. There, through its counsel, it stated:

> "After the Referee's decision, the position of the management of Irca [Railways] necessarily had to be reexamined in the light of that decision, and

the management, with advice of counsel, did make such reexamination.

The result of that reexamination is that Irca appears in this Court as an appellant from the judgment below on the ground that the damages awarded against United are inadequate.

. . . . . .

The management of Irca must always act, as it has always tried to act, solely in the interest of that corporation. We have, therefore, as its counsel advised that the judgment below should be supported and increased, so far as the efforts of Irca management may properly urge such increase". (I—96a-97a).

On the above facts the District Court held (I—21a):

"We find that IRCA had the requisite knowledge to bring suit against United for antitrust violations; that they had the ability to and did in fact sue United; and that at the very least the statute of limitations should not be tolled beyond the election of independent directors in 1959."

This finding was affirmed by the Court of Appeals (quoted at p. 19 below).

Argument

Upon the above-described facts, found by the courts below, respondent United submits that the petition should be denied because the two lower courts correctly decided the questions sought to be raised by Railways in its petition, because the decisions involved no more than application of a settled principle concerning the statute of limita-

tions to particular complex facts, and because partial summary judgment in favor of United is warranted on the alternative ground of the rule against splitting claims.

1. The decisions below are supported by a well-established body of law, including decisions by this Court, that a plaintiff who seeks to toll the statute of limitations on the basis of domination of a corporation has the burden of showing "a full, complete and exclusive control in the directors or officers charged." *Payne* v. *Ostrus* 50 F. 2d 1039, 1042 (CA 8 1931).

Such was the holding in *Curtis* v. *Connly*, 257 US 260 (1921), not even cited in the petition herein. That was an action brought by a receiver of a national bank to recover from former directors for certain improprieties. Defendants pleaded the statute of limitations which this Court held would not be tolled (257 US at 263-4).

> "Three new directors came upon the board before August 3, 1910. . . . They came to the board as the eyes of the bank. Anyone of them having notice was bound to do what he could to avert or diminish the loss. Indeed the bill seeks to charge one of them for not having done his duty. Notice to an officer, in the line of his duty, was notice to the bank. A single director like a single stockholder could proceed in the courts. *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 381, 403."

The Circuit Courts have consistently followed this holding in those cases where it has been established that the defendant's control over the corporation was less than complete. *Payne* v. *Ostrus* 50 F. 2d 1039 (CA 8 1931); *McNair* v. *Burt* 68 F. 2d 814 (CA 5 1934); *Farmer* v. *Standeven* 93 F. 2d 959 (CA 10 1937); *Anderson* v. *Gailey*

33 F. 2d 589 (ND Ga. 1929). Cf. *Michelsen* v. *Penney* 135F. 2d 409, 416 n.2 (CA 2 1943).

The facts and findings of the courts below properly applied the principles of these cases to the suit at bar.

This emerges from the facts as already stated and from the opinions of both lower courts. But to re-emphasize the main points: First, it is undisputed that from at least 1959 onward there were present three independent directors with full knowledge of the alleged antitrust claims and ability to sue upon them. Second, it is undisputed (a) that from at least 1949 there was at all times a host of highly independent stockholders who brought both the *Ripley* action in the state court and the *Henis* action in the Federal court on facts identical to those grounding the present complaint and (b) that from at least the time of the 1952 election those facts had been made known to all stockholders as a class.

This Court's decision in *Curtis* v. *Connly* stands for the proposition that knowledge by *either* independent minority directors *or* the stockholders as a class is sufficient to start the statute running. Here *both* factors were present.

On the latter factor, the relevant rule is stated by the Fourth Circuit in *White* v. *FDIC* 122 F. 2d 770, 775 (CA 4 1941) cert. denied 316 US 672 (1941):

> "It is argued that the statute did not run in favor of the directors because, it is said, they controlled the corporation through a majority of stock ownership and control of the directorate and there was consequently no one to sue them. It is clear, however, that suit in behalf of the corporation could have been brought by any of the independent stockholders. Curtis v. Connly, 257 U. S. 260, 42 S. Ct. 100, 66 L. Ed. 222; Hughes v. Reed, 10 Cir., 46 F. 2d 435; McNair v. Burt, 5 Cir., 68 F. 2d 814,

815; Anderson v. Gailey, D. C., 33 F. 2d 589, 592; Mobley v. Faircloth, 174 Ga. 808, 164 S. E. 195, 83 A. L. R. 1201 . . ."

2. Railways in its petition herein does not address itself to the principle of these cases. Instead, it repeatedly misrepresents, quotes out of context (Pet. pp. 2, 16, 17, 18) and characterizes as a crucial "concession" two sentences from the brief of United in the Court of Appeals. Since petitioner attempts to make so much of these two sentences, we must quote and reaffirm the full context. At pp. 55-6 of our brief below we said:

> "Appellant attempts to counter this argument by referring (br. 45 and elsewhere) to the findings of 'domination' which were made in *Ripley*. Such a reference misses the point. The 'domination' found in *Ripley* was the kind of domination which the New York courts held was sufficient to impose upon United a fiduciary duty to Railways and its other stockholders. Having established the existence of a fiduciary relationship, the New York courts then went on to declare that the contracts between the parties were unfair to Railways and that their terms should be adjusted accordingly. That kind of domination, which the New York courts held sufficient to establish a fiduciary duty, we submit, is altogether different from the complete control which may be sufficient to toll the running of the statute of limitations.* We may concede for present purposes (as *Ripley* determined) that United dominated Railways to such an extent as to become accountable to Railways on a fiduciary basis. We may even concede for present purposes that the

*Petitioner quotes only the two sentences between the asterisks.

degree of 'domination' found in *Ripley* may have been sufficient to prevent Railways from bringing an action in its own name, as the Appellate Division pointed out in the quotation at appellant's br. 45-6.* But even that kind of domination did not prevent the *Ripley* stockholders from suing; nor would it have prevented either the *Ripley* stockholders or (after 1959) the independent *Ripley* directors from suing on Railways' behalf on the present claim. Under the *Curtis* doctrine (whatever the fiduciary relationship involved) the statute of limitations accordingly was not tolled."

The holding of the Appellate Division in *Ripley,* referred to in our brief below and twice quoted in the petition herein (pp. 18 and 32a), was contained in an opinion dated June 23 1959 (8 AD 2d 310); based upon a judgment entered December 19 1957 (I—167a-175a), on the basis of a trial record that was closed on January 4 1956 (Report of Referee Hammer dated June 27 1957, p. 2). Whatever may have been the "domination" which was held in *Ripley* to give rise to a fiduciary duty before 1956, or even thereafter, has no relevance to the present question whether there existed from at least 1959 onward such "full, complete and exclusive control" as alone would suffice to toll the running of limitations. On that question our position, already discussed, is that there was no such tolling because (a) even before 1959, and regardless of "domination" as a fiduciary, the Railways stockholders were in a position to sue and did sue and (b) from at least 1959 onwards there were also present independent directors with full knowledge and ability to sue.

We stress again that, apart from the correctness of the decision on this issue, it involved no more than the application of an established legal principle to a particular

complex of facts not likely to be repeated and does not warrant review by this Court.

3. The procedural question as to who might have been the named plaintiff or plaintiffs in a suit brought on behalf of Railways is of no basic importance. The suit would in any event have been brought on Railways' behalf and for its benefit. The District Court, while holding that under the *Ripley* decision United "controlled" the Railways even through 1961, nevertheless found and held (I—21a):

> "... that IRCA had the requisite knowledge to bring suit against United for antitrust violations; that they had the ability to and did in fact sue United; and that at the very least the statute of limitations should not be tolled beyond the election of independent directors in 1959."

The Court of Appeals affirmed this holding, saying (App. 18a):

> "Since IRCA has not met its burden of demonstrating that after the election of the three independent directors in 1959, UF had such 'full, complete and exclusive control' as to rule out the possibility of a corporate suit against it, on the demand of a stockholder or directors, for antitrust violations the facts giving rise to which had become well-known, any tolling of the statute ended at least by that time. In consequence the District Court properly held that all claims under the antitrust laws arising prior to February 16, 1961, were barred by limitations."

We submit that these holdings were correct.

4. This Court should also refuse the writ sought by Railways inasmuch as the decisions below are sustainable

upon the alternative ground of the bar against splitting of claims upon which alternative basis the District Court granted United's motion for partial summary judgment. The Court of Appeals rejected in part and in part declined to consider United's contentions in this regard in view of its decision on the statute of limitations. United's contentions in this respect are set forth in its conditional cross-petition filed in No. 132 at this term.

5. Contrary to the contentions of petitioner (Pet. p. 15) the petition herein presents no novel questions of general importance. The general principles enunciated above are well-established and their application by the Court below to the unusual facts of this case was entirely proper.

Such cases as *Poller* v. *Columbia Broadcasting System* 368 US 464 (1962) and *White Motor Co.* v. *US* 372 US 253 (1963) cited by petitioner (Pet. pp. 3, 16-19, 22, 23) relative to the use of summary judgment in antitrust cases have no application where (1) as here, petitioner cross-moved for summary judgment thereby asserting that as to his claims there were no triable issues of fact and (2) as here, summary judgment was based upon specific statutory defenses, not upon the merits of the claims "where motive and intent play leading roles" (368 US at 473)[7]. In addition it should be noted that both those cases were decided before the recent amendment to Rule 56(e) of Rules of Civil Procedure, effective July 1 1963, requiring, in substance, an adverse party to set forth in answering papers, specific facts showing there are genuine issues for trial. This petitioner failed to do. It makes no

[7]See *Ash* v. *I. B. M.* 384 US 927 (1966) where certiorari was denied to review a judgment dismissing the complaint in a derivative antitrust suit upon motion attacking plaintiffs' standing to sue derivatively.

contentions before this Court that there are any such issues for trial.

Burnett v. *New York C. RR Co.* 380 US 424 (1965) and *Glus* v. *Brooklyn Eastern D. T.* 359 US 231 (1959), also cited by petitioner (Pet. pp. 3, 16-17, 23-24, 26), both F. E. L. A. cases, are also clearly inapplicable. In *Burnett,* the plaintiff had instituted timely action in the state court, which had been dismissed on a technical question of venue, and had promptly re-instituted suit in the Federal court. In *Glus,* an uncontradicted allegation in the complaint that defendant had misrepresented to the plaintiff that his time to sue was still open, was held sufficient to withstand a motion to dismiss. Here the plaintiff, its directors and its stockholders, for the reasons stated above, all had ample opportunity to initiate this action within the period of the statute of limitations.

6. Petitioner's final argument that it should have been granted partial summary judgment is without any merit; it was rejected by both courts below and is fully answered by the opinion in the Court of Appeals.

Conclusion

For the reasons stated above, the petition should be denied.

Dated: New York, New York
April 24 1967

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1217

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Petitioner,

v.

UNITED FRUIT COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1. United's brief *completely abandons* the rationale of the decision of the Court of Appeals on the issue of statute of limitations and instead reverts to the reasoning of the decision of the district court, upon which the Court of Appeals refused to pass. United thereby acknowledges by its silence the errors of the Court of Appeals cited in the petition. (United contends in its cross petition, No. 1320, that the Court of Appeals also erred on the issue of *res judicata;* our separate brief in opposition shows that the cross petition is without substance.)

United does not contest petitioner IRCA's contention that the undisputed record evidence establishes that United dominated six out of the nine IRCA directors from May 1959 through at least February 16, 1961 (Petition 18-19).

Moreover, United reaffirms its concession that the degree of domination found in *Ripley* would have been sufficient "*to prevent Railways from bringing an* [*antitrust*] *action in its own name*" against United even after the election of three independent directors in 1959 (U.F. Br. 17-18).* Therefore United and IRCA both agree that the Court of Appeals below was in error as to the record and that the undisputed record evidence (Petition 18-19) is as follows:

> (i) defendant dominated a majority of plaintiff's directors during the period May 1959-February 1961 (Petition 18-19);
>
> (ii) a demand on the plaintiff to sue defendant would have been a "useless and futile act" (Petition 18; App. 32a; U. F. Br. 17-18);
>
> (iii) defendant's domination of IRCA would have been sufficient "to prevent Railways from bringing an [antitrust] action in its own name [against United]" (Petition 18-19; U. F. Br. 17-18).

Since the U. S. Court of Appeals itself held that "the odds may have been against the likelihood that [plaintiff's] board of directors would have authorized an antitrust action against [defendant]" (App. 14a), and in light of the above, the Court of Appeals clearly erred in holding (App. 15a):

> "we cannot conclude that a demand on the IRCA directors for the institution of a treble damage action between May 1959 and February 1961 by a stockholder

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* United's belated attempt to restrict its concession to ante-1959, by stating that it was based on the trial record in *Ripley* that was closed on January 4, 1956, is fully answered by the language of its concession in two separate sentences: "concede for present purposes" (U.F. Br. 17). That language demonstrates that United was conceding the *continuation* of that same degree of domination, found in *Ripley*, to the period between May 1959 and February 1961.

or director would necessarily have been fruitless." (See Petition, pp. 15-25.)

United in no way attempts to support that critical holding of the Court of Appeals.

Nor does United negate our contention that the U. S. Court of Appeals drew inferences, made assumptions and argued possibilities *in favor of defendant, the moving party,* on its motion for summary judgment, contrary to the decision of this Court in *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 473, requiring the court to "look at the record on summary judgment *in the light* most favorable to [plaintiff], the party *opposing* the motion." *Accord: U. S.* v. *Diebold, Inc.,* 369 U. S. 654, 655 (civil antitrust).

United also fails to dispute the general rules that federal statutes of limitations are tolled where plaintiff "has been prevented from asserting" its claims, *Burnett* v. *N. Y. Cent. R. Co.,* 380 U. S. 424, 429, and that "the maxim that no man may take advantage of his own wrong" bars "inequitable reliance" on federal statutes of limitations, *Glus* v. *Bklyn. East. Dist. Term.,* 359 U. S. 231, 232-3).*

---

* United misses the main thrust of *Glus.* There the estoppel to plead the statute of limitations was based on an unintentional misstatement by defendant which induced the plaintiff to delay commencement of his action. Our case is a much stronger one for estoppel: United prevented IRCA from bringing suit against it by its wrongful domination over IRCA's management. Moreover, United, in discussing *Glus,* deliberately begs the question by its *ipse dixit* that *"plaintiff,* its directors and its stockholders, for the reasons stated above, all had ample opportunity to initiate this action within the period of the statute of limitations" (21). Indeed, United never did state the reason why *plaintiff* had the opportunity to institute this action within the tolled period; *contra* United's position at page 21, United concedes elsewhere (18) that its domination over IRCA through February 1961 was "sufficient to prevent Railways from bringing an [antitrust] action in its own name" against United.

United and IRCA both agree that the question of law before this Court, is whether the *mere possibility* of a *derivative* suit on behalf of IRCA, by an informed minority director or a stockholder, defeats tolling of the statute where United, by its domination of a majority of IRCA directors, prevented IRCA itself from asserting its antitrust claims against United. The Court of Appeals* refused to pass upon that question (App. 16a):

> "We thus leave for another day the more difficult question whether or under what circumstances the mere possibility of suit by an informed stockholder or director would end tolling due to 'domination' of a corporation by the alleged wrongdoer."**

2. We show hereinbelow the error of the district court's decision, now United's sole reliance. *Curtis* v. *Connly*, 257

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* United's *ipse dixit* that the Court of Appeals' decision was based on "settled principle" (14), "established legal principle" (18), "general principles . . . well estabished" (20), and "presents no novel questions" (20) is not only inconsistent with its complete failure to attempt to support that decision but is absurd in light of the Court of Appeals' appraisal of the issue: "vexing problem" (App. 9a), "more difficult question" (App. 16a), "precedents in this court . . . do not assist decision" (App. 11a), and "other federal decisions going in various directions" (App. 12a).

** The Court of Appeals was not holding that plaintiff had to establish that each and every director was dominated, otherwise it would not have left unanswered the question of whether an informed independent minority director defeats tolling. That being so, the Court of Appeals' determination, cited by United, that "UF's control of IRCA thus was no longer 'full, complete and exclusive' *in the sense here relevant*" (App. 15a-16a) did not require domination of *all* IRCA directors. That quote followed the discussions about, and must have related to, the six directors, who, the Court of Appeals erroneously speculated might have been, upon demand, induced to sue even though *"the odds may have been against the likelihood"* (App. 14a) of an antitrust action against United and even though United conceded that a demand was a "useless and futile act" (Petition 18).

U. S. 260, was the only case cited by the district court on limitations (I-19a), and the Court of Appeals showed clearly why it does not apply.*

Moreover, United has misinterpreted *Curtis* and the cases which follow it (U.F. Br. 15-17). United ignores the following language of the Supreme Court (*Curtis*, 257 U. S., at 264):

> "It is said that they [the defendant directors] stood in a fiduciary relation to the bank. *But they were strangers to it when they left the board, more than six years before this suit was brought.*" (Italics supplied)

Thus, the statute started to run as to each director when *he terminated his fiduciary relation to the bank.* Applying this to our case, the statute began to run from 1962 because only then did United terminate its management control over, and fiduciary relation toward, IRCA.

United cites *Payne* v. *Ostrus*, 50 F. 2d 1039 (C. A., 8), but ignores both its holding and its interpretation of *Curtis*.

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* *Viz.* (i) *Curtis* was governed "by the Rhode Island statute of limitations"; (ii) that statute had an express tolling provision but only for fraudulent concealment of the cause of action; (iii) the Supreme Court's opinion did *not* discuss the question whether the statute was tolled until the bank passed into the hands of a majority of innocent directors; (iv) appellant's briefs in the Supreme Court "went *not to domination* as such but rather to knowledge"; (v) "Although the domination issue thus was raised by the facts, *the Supreme Court seems not truly to have focused upon it*"; and (vi) "we do not consider it nearly so conclusive in defendant's favor *as did the district judge*" (App. 10a-11a). The district court also held (I-17a) that "if 'practical control' of the type found in *Ripley* is enough to toll the statute of limitations, *we are compelled by the doctrine of collateral estoppel to decide this issue in plaintiff's favor.*" Once *Curtis* is knocked out, then, in light of United's concession (17-18) that the degree of "domination" found in *Ripley* was "sufficient to prevent Railways from bringing an action in its own name", was not the court "compelled" to decide the tolling issue for plaintiff?

Like *Curtis, Payne* was an action against directors individually. The Court held as follows (at 1043):

> "The fiduciary relation between a bank and its directors ceases when they leave the board. *Curtis* v. *Connly.*"

Accordingly, the court held that the statute of limitations began to run in favor of each director from the date of his resignation from the board.

Michelsen v. *Penney*, 135 F. 2d 409, 416, n. 2 (C. A. 2), cited by United, is inapplicable since it was, also, a concealment (App. 11a) case involving the local tolling rule. It cited cases both ways but did not find it necessary to resolve the issue because of the control of all the directors. *Contra* United's "well-established law", the Court of Appeals held: "While the parties have cited many other federal decisions *going in various directions*, we see little to be gained by detailed analysis of them" (12a-13a). Thus, the *McNair, Farmer* and *Anderson* cases, cited by United, are also not helpful for the reasons stated above.

United (16-17) quoted incompletely from *White* v. *Fed. Dep. Ins. Corp.*, 122 F. 2d 770, 775. The court held that tolling of limitations under the Virginia statute, for concealment, continues during adverse domination of a majority of the board of the bank unless *all* parties affected thereby have knowledge of the wrong and *full power to pursue a remedy*. In that case, the full power included the vast combined resources in money and legal talent of the U. S. Comptroller of the Currency and the Federal Deposit Insurance Corporation, duty bound to institute, and powerful enough to pursue, the necessary legal proceedings.

Plainly, under that test, tolling of the statute of limitations continued on the antitrust claims of IRCA against United until at least May 1961. No financial resources and legal talent were available to IRCA to vindicate its federal

rights. With the majority of the IRCA Board in United's pocket, IRCA was itself disabled from suing and its treasury and legal staff were effectively tied up by United's adverse control. Even if some stockholder volunteered to bring a stockholder's action after he learned of the antitrust violations, where would he get the financial sinews and lawyers to wage the bitter war? The *Ripley* action then pending in the State courts, in the course of which the antitrust violations first came to light, was being relentlessly contested by United with the combined treasuries of, and the heaviest legal batteries of New York City engaged by, both United and IRCA. That was enough to scare off the hardiest stockholders, directors, experts and lawyers. The *Ripley* action was not completed until 1961. Only thereafter were the stockholders' lawyers paid for work going back to 1949 and to fix the amount of their fee they had to fight United and IRCA, again, without compensation for all that extra effort. The *Ripley* lawyers had learned the costly lesson United had deliberately taught them: no more stockholder actions against United! IRCA brought the present action less than four years after the successful completion of *Ripley* and very shortly after it engaged its present lawyers who, until January 1963, were engaged in litigation against IRCA and United for their fee in the *Ripley* matter. Moreover, the second condition necessary to end tolling was not met, *viz.* knowledge by *all* the IRCA stockholders of the antitrust violations. United obviously has not shown, and cannot show, the requisite ample knowledge of the material facts by *all* the thousands of IRCA stockholders affected, *contra* United's assertion (16), without a record reference.

Allen v. *Wilkerson,* 396 S. W. 2d 493 (Tex. Civ. App., 1965) (application for writ of error refused; no reversible error), is squarely in point. With respect to a cause of action by a corporation against a director, the court expressly rejected the argument that tolling ended when

one stockholder-director was in a position to sue on behalf of the corporation (*id.*, at 501). The court stated as follows:

> "And where, as here, the management of a corporation's affairs are de facto under the domination and control of the adversary of such cause of action, or the corporation is de facto powerless to sue on such cause of action because of a lack of a disinterested majority of its board, mere notice to shareholders does not start running of limitations against the corporate cause of action" (*id.*, at 502).

Accord: *Rankin* v. *Cooper,* 149 Fed. 1010, 1015-1016 (W. D. Ark.); *Natl. Bank of Com.* v. *Wade,* 84 Fed. 10, 15-16 (D. Wash.).

The opinion of the district court is predicated on the doubly untenable hypothesis that if a stockholder does not bring a derivative action he is guilty of laches and that such laches is attributable to the corporation. The law is clearly otherwise. So in *Whitten* v. *Dabney,* 171 Cal. 621, 154 Pac. 312, the court held that:

> "It is in no sense his [a stockholder's] duty to sue."

and, accordingly, that notice to stockholders is immaterial (p. 629). The court observed in this connection that the stockholder necessarily "gives consideration to the time, trouble and expense of the litigation and the loss in which he would be involved if he failed to prevail" (*id.*). Such considerations cannot result in the loss of the corporation's right to sue, once freed of the wrongdoer's domination; during that domination,

> "the statute of limitations does not run against it. It is like the minority of an infant." (*id.,* 629)

Accord: 13 Fletcher Cyc. Corp. Perm. Ed. § 5886, p. 306: discovery of the wrong by a stockholder does not

bar the corporation "so long as it is under disability to sue by reason of the delinquents' control"; also § 5874, p. 283.

A very pertinent case cited by Fletcher in this connection is *Liken* v. *Shaffer,* 64 F. Supp. 432, 442.*

The statute is tolled because the corporation, by virtue of the wrongdoer's domination, is unable to sue it or prosecute the action effectively and in good faith. The district court's decision that the corporation has lost its federal rights because of a stockholder's failure to enforce them, is inconsistent with *Gottesman* v. *General Motors,* 268 F. 2d 194, 197 (C. A. 2). There the Court held that an antitrust violation by DuPont injuring General Motors, a corporation under its control,

> "can in no way be ratified or rectified by a vote of the shareholders of General Motors."

United seeks to rely on a stockholder "ratification or rectification" of its antitrust wrongs, through a mere omission by IRCA stockholders to bring a derivative stockholder's action to redress those wrongs. This it cannot do

---

* "In an ordinary action by a corporation on a claim, the conduct of a particular stockholder is not material. Stockholders have no power to act for a corporation except at a corporate meeting . . . where a claim is asserted in behalf of a corporation in a stockholder's derivative action in order for matters to be a bar to the claim, they must be such matters as relate to the corporation itself, and the conduct of a particular stockholder is not material . . . Acquiescence of a stockholder in the wrong complained of, which prevents him from maintaining a stockholder's derivative suit, is distinct from the acquiescence on the part of a corporation which is a bar to the claim . . . *However, the claim of the corporation cannot be barred by the conduct or situation of the particular stockholder or stockholders instituting the proceedings* . . ." (italics supplied)

under *Gottesman, supra. Accord: Rogers* v. *American Can Co.*, 305 F. 2d 297 (C. A. 3).*

The decision of the district court also overlooks basic principles of corporation law.

> "The corporation (as distinguished from its shareholders) is vested with the primary rights, legal or equitable or both, to redress wrongs committed against it." 2 Hornstein, Corporation Law & Practice § 711, pp. 190-1.

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* There, the court refused to dismiss an action for treble damages even though a majority of the stockholders, independent of the wrongdoer, voted against bringing the action. The Court held as follows, quoting the lower Court's opinion with approval:

> "Thus any attempt by corporate stockholders *by vote or otherwise*, to ratify such illegal acts in the past . . . would be a nullity. . . .
>
> "Since the vote is a nullity, *obviously it cannot bar a suit by the injured corporation*, . . . to obtain relief." (316; italics supplied)

IRCA's stockholders' omission to bring a derivative action to enforce IRCA's rights against United for violation of the antitrust laws is a "nullity", which "cannot bar a suit" by IRCA; "this is especially so" insofar as the action is based "on Federal antitrust law . . . These laws express an important nationwide public policy. Obviously, it is unlawful to violate them. It would seem equally obvious that it would be legally impossible to ratify their violation" (*id.*, 316).

> "It would be unthinkable to allow the ratification of violations of Federal law to serve as a bar to a suit for redress of the injuries sustained thereby where Congress by specific enactments has provided for such redress as a matter of public policy." (*Id.*, 317)

A fortiori, it would be unthinkable to allow a mere omission to work the same legal impossibility, by taking away the very tolling which is intended to keep alive the corporation's right to enforce those antitrust laws by private action, as a matter of Congressional policy.

"The separate entity is the rule, not the exception."* *Id.*, § 751, p. 262.

A plaintiff corporation can, at some stages without, and at any stage with, its opponent's consent, dismiss an action without the approval of the court. F.R.C.P. § 41(a)(1). Not so, in the case of the derivative action. F.R.C.P. § 23(c). Again, the plaintiff corporation can compromise the suit, at any stage, without giving any stockholders notice thereof and opportunity to be heard thereon. Cf. F.R.C.P. § 41(a)(1). Not so, as to the derivative action. Settlement of such an action requires notice and hearing to all stockholders. F.R.C.P. § 23(c). Thus, United now seeks to bind IRCA as to its causes of action, because not asserted—and at least in part not assertable—in its behalf by certain individual stockholders or minority directors, even though such stockholders and directors could not have bound IRCA as to such causes of action, by dismissal or compromise, had they actually brought derivative suit thereon. This is an additional anomaly embedded in the decision of the district court.

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* *Fanchon & Marco, Inc.* v. *Paramount Pictures*, 202 F. 2d 731, 734 (C. A. 2), sustaining the right to bring a derivative stockholders' action, stated:

> *"Usually the wrongdoing officers also possess the control which enables them to suppress any effort by the corporate entity to remedy such wrongs.* * * * The cause of action which such a plaintiff brings before the court is not his own but the corporation's. It is the real party in interest and *he is allowed to act in protection of its interest somewhat as a 'next friend' might do for an individual, because it is disabled from protecting itself."* (Italics supplied)

The district court's decision whose rationale the Court of Appeals refused to affirm, takes the untenable position that because a "next friend" may sue for an individual during the latter's disability, the latter may not sue when the disability is removed.

3. United and the district court, in relying on the fact that the *Ripley* trial record exposed antitrust violations, has confused two exceptions; *viz.*, those based, respectively, on concealment and on domination. Only the former, not the latter, is dissolved by publication of the facts underlying the cause of action. The measure of the period tolled is governed by the reason for the tolling. Where "concealment" is the reason, plainly discovery of the facts ends the suspension. But where, as here, "adverse domination" is the reason, the tolling must continue while the adverse domination lasts, regardless of whether the wrong becomes notorious.*

4. The district court found "There can be no doubt that United controlled IRCA at least through 1961" (254 F. Supp., at 239). It is therefore immaterial that IRCA counsel in the *Ripley* lawsuit, *after* a favorable trial court

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* See 63 Harv. L. Rev. 1177, 1219 "the period [of limitations] begins with the termination of the influence or duress". *Accord:* 34 Am. Jur., *Lim. of Actions*, § 413, p. 325: "The fact that the *plaintiff* has been prevented by the defendant from commencing action within the period of limitations operates to estop the defendant from pleading the statute of limitations". (Italics supplied)

United, in its Statement of Case, makes reference to facts concerning its argument on *res judicata* (6-7), knowledge of the stockholders or their lawyers concerning United's antitrust violations (7 through 11)—even though United concedes (7) "no question of tolling by reason of fraudulent concealment is here involved," and knowledge of IRCA's minority directors after 1959 (12 through 13). All of the above are immaterial on the issue of whether United's domination over IRCA prevented IRCA from asserting its antitrust claims against United and thereby tolled the limitations statute. *Henis* v. *Compania Agricola*, 210 F. 2d 950 (C. A. 3) *aff'g* on one ground only 116 F. Supp. 223, cited by United (12), has nothing to do with the issue. The Court of Appeals there held merely that the two plaintiff stockholders of IRCA in that case, who had bought their stock *in 1951*, had shown no legal capacity under Federal Rule of Civil Procedure (now) 23.1 to bring any action in behalf of IRCA to compel the restoration of stock and notes sold by IRCA *in 1936*.

decision for its benefit, were permitted to support the *Ripley* plaintiffs' request for higher damages on appeal. Indeed, United in the state court argued that that belated position of IRCA's counsel showed that IRCA was independent of United's domination; but the state courts rejected the contention and awarded damages based on said domination for a period beyond the date IRCA counsel took that position. IRCA counsel's only other alternative, on the appeal, was to take the position that IRCA should be *denied* the multimillion dollar recovery awarded by the trial court. That position would have exposed each IRCA director to suit for waste. The suggestion that IRCA would have sued United for half a billion dollars while "United controlled IRCA : . . through 1961", as pervasively and thoroughly as is shown by the facts found in *Ripley* and not contested here, is preposterous. Moreover, United admits that its domination over IRCA was "sufficient to prevent Railways from bringing an action in its own name" (18). In addition, the Chairman of the IRCA board was the general attorney for United.

United's *non sequitur* is that because IRCA supported the stockholders' position on appeal in *Ripley,* it would have filed a suit on the antitrust claims here presented. That argument loses sight of the fact that each director of IRCA as well as IRCA's counsel (for 30 years) would have likewise been prospective defendants in such an antitrust suit brought by IRCA. Such directors were not going to sue themselves in order to sue United. Therefore, United's suggestion that there were "manifestations of the independence of Railways' board" (13) in its support of the stockholders' appeal in *Ripley,* is far-fetched.

United contends (14, 19) in this connection that the Court of Appeals affirmed the district court's erroneous finding that IRCA "had the ability to and did in fact sue United." Examination of the Court of Appeals' opinion relied upon by United (at p. 19 of United's Br.) fails to support it.

Moreover, the district court's sole reliance for that finding must have been IRCA's support of the stockholders' appeal, which destroys the value of that finding.

5. The recent amendment to Rule 56(e) cited by United (20), requiring an adverse party to a motion for summary judgment to set forth in answering papers specific facts showing there are genuine issues for trial, has been fully complied with by petitioner on the issue of United's domination of a majority of IRCA directors (Petition 18-19). United fails to rebut that fact.

New Rule 56(e) is, moreover, helpful to petitioner on petitioner's motion for summary judgment (I-178a-250a), since United *completley failed* to file any affidavit in opposition to petitioner's motion. Accordingly, since it did "not so respond, summary judgment, if appropriate, shall be entered against [it]". Rule 56(e). It is appropriate here (Petition 26-28).

CONCLUSION

For the reasons stated in the petition, reinforced here, IRCA's petition for a writ of certiorari should be granted.

Dated: New York, New York, May 9, 1967.

Respectfully submitted,

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SUPREME COURT, U. S.
APR 25 1967
JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1320

UNITED FRUIT COMPANY,
Petitioner,

—against—

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

UNITED FRUIT COMPANY, *Petitioner,* *—against—* INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, *Respondent.*	No.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United Fruit Company (*"United"*), defendant below, prays for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered herein January 27 1967. Respondent International Railways of Central America (*"Railways"*) was the plaintiff below. Railways has petitioned in No. 1217 for issuance of a writ of certiorari with respect to the same judgment, and this petition of United Fruit Company is by way of cross-petition, the writ prayed to issue only in the event this Court should grant the petition in No. 1217 at this Term.

In the District Court both sides moved for partial summary judgment. The motion by United raised two defenses to Railways' action:

(a) the rule (in the nature of *res judicata*) against splitting of causes of action,

(b) the Federal statute of limitations with respect to matters occurring more than four years before the filing of the complaint.

The cross-motion by Railways was based on the claim:

> (c) that most of the basic facts had been found in its favor in the prior state court litigation and that United was estopped from denying any of those facts.

The District Court found in favor of United on all three items and granted partial summary judgment in United's favor on (a) and (b), and denied Railways' cross-motion on item (c).

The Court of Appeals affirmed the decision of the District Court on items (b) and (c), and held as to (a) that the District Court had erred in upholding the splitting defense as to years after 1960 and that the issue as to earlier years need not be decided in view of the affirmance on issue (b).

Railways, as petitioner in No. 1217, has limited the review sought by it to questions (b) and (c).

The review sought by this cross-petition seeks to bring question (a) into any review which this Court may undertake by virtue of the petition in No. 1217 because (i) the questions are necessarily interrelated in the record (ii) fairness is served by considering the whole case and the claims of both parties as to errors below and (iii) proper application of the rule against splitting of causes of action is a question meriting review under Rule 19 of this Court in addition to being a further support for the judgment of the Court of Appeals.

The defenses raised in (a) and (b) are partly overlapping in that they would dispose of some of the same claims made by Railways. To the extent defense (a) overlaps (b) it can and will be raised in No. 1217 as an alternative ground for sustaining the judgment of the Court of Appeals if this Court should grant the writ in No. 1217. Since defense (a) covers some subject matter not covered by (b), this petition has been filed in the belief that the

Court should resolve all of the issues in controversy if it decides to grant the petition in No. 1217.

Opinions Below

The opinion of the Court of Appeals, not yet officially reported, is attached as Appendix A to the petition in No. 1217. The opinion of the District Court, reported at 254 F. Supp. 233, is set forth in volume I, pp. 5a-21a, of Railways' appendix to its brief in the Court of Appeals filed with this Court in No. 1217.

Jurisdiction

The judgment of the Court of Appeals affirming in part and reversing in part the District Court was entered January 27 1967. Jurisdiction of this Court is invoked under 28 United States Code § 1254.

Question Presented

Where plaintiff's representatives (minority stockholders enforcing the rights of plaintiff corporation in a derivative stockholders' suit) had successfully prosecuted in the New York state courts during 1949-61 claims against defendant (petitioner herein) predicated upon theories of breach of fiduciary duties by defendant with respect to plaintiff corporation, and had recovered in the state court action a judgment exceeding $9,000,000 together with additional amounts to be paid *in futuro* under decree of the state court, and where the state court record and decision were permeated with evidence of conduct then regarded by plaintiff's representatives as violations of the United States antitrust laws on the part of defendant, known to and recognized by plaintiff's said representatives, and by all the stockholders as a class at the t ne of the state court action—

Does proper application of the rule against splitting claims (*res judicata*) permit plaintiff to bring into Fed-

eral court the same alleged antitrust violations and seek additional damages for injury to plaintiff's business already the subject of compensation by the state court judgment, on the basis of facts substantially identical to those disclosed and ventilated in the state court action?

Pertinent Statutes

The statutes pertinent to the antitrust claims asserted by plaintiff Railways, respondent herein and petitioner in No. 1217, are Sherman Act §§ 1 and 2 (15 USC §§ 1 and 2) and Clayton Act §§ 4 and 7 (15 USC §§ 15 and 18) which are reproduced in Appendix C to the petition in No. 1217.

Concise Statement of the Case

This suit claims treble damages under the antitrust laws (15 USC §§ 15, 22 and 26). The prior suit which, under the rule against splitting of claims, bars prosecution of the claims here is *Ripley* v. *International Railways of Central America and United Fruit Company,* reported at 8 AD 2d 310, aff'd 8 NY2d 430. That was a minority stockholders' action commenced in the Supreme Court New York County, February 14 1949 on behalf of Railways by 27 stockholders alleging domination and control of Railways by United, which at that time owned some 42% of the stock of Railways. The *Ripley* complaint alleged abuse by United of its resultant fiduciary obligations through under-payment of freight rates and in other ways summarized in the moving affidavit of Porter R. Chandler (par. 7; I-29a-30a).[1]

[1]References such as above are to the Roman numbered volumes, and the pages thereof, of Plaintiff-Petitioner's Appendix in the Court of Appeals filed with this Court in No. 1217 at this Term.

Four of the six attorneys who now represent Railways before this Court appeared and participated actively for Railways' stockholders throughout the *Ripley* case, which resulted in a judgment for the benefit of Railways of $4,531,055.38 as of January 2 1958, which, together with interest and future payments provided for by the judgment, caused United to pay to Railways $9,139,596.42 on March 1 1961. The state court judgment also directed a revised scale of payments to be made *in futuro* under the contracts between Railways and United; and these payments are still being made (I—30a). The immense scale of the *Ripley* trial was noted in the District Court's opinion (I—6a, 9a-10a) and is set forth in pars. 8 and 9 of the Chandler affidavit (I—30a-32a).

Identity of Subject-Matter as Between the Two Actions

In January 1962 United sold substantially all of its stock in Railways. In February 1965 Railways, under its new ownership and represented by four of the same attorneys who had previously represented the *Ripley* plaintiffs, brought the present action. The present amended complaint charges, in substance, that the same acts which were claimed as breaches of fiduciary duty in *Ripley* also constituted violations of the antitrust laws (except for the fifth claim, II—31-2, which is for breach of contract, not involved in the decisions below). It asks total treble damages of $507 million, less a credit for the $9 million-odd paid under the Ripley judgment.

The District Court found identity of subject-matter between the cases, in the following terms (I—11a):

> "We find that the facts presented to the New York court in the *Ripley* case were substantially the same as those presented by this litigation."

The Court of Appeals did not disagree, although pointing out that violations of the antitrust laws as such were not at issue in the state court (App. 19a-20a).[2]

While the thrust of the charge in *Ripley* was the injury caused to Railways by breach of United's fiduciary obligation as a controlling stockholder and the thrust here is the injury allegedly caused to Railways by United's violation of the antitrust laws, nevertheless the field of controversy is the same in both cases. The same acts of alleged wrongdoing, similar allegations of monopolistic practices, and the same items of damage appear in both. The inflation of the damage bill from the $9 million-odd awarded in *Ripley* to the $507,000,000 claimed here is accomplished by (i) trebling under the antitrust laws, (ii) adding back damage claims which had been litigated and rejected in *Ripley,* and (iii) the ingenious device of running the claims back to 1928 where the statute of limitations in *Ripley* had precluded recovery before 1943. All of the pre-1943 transactions which figure in the present complaint were, however, fully developed in *Ripley;* and both cases essentially involve the contractual and other relations between Railways and United in the import, export and internal commerce of Guatemala in the period of 1904 onwards.

As to the antitrust claims arising in the *Ripley* record, the District Court found that, notwithstanding the inability of the state court to consider such claims or violations, nevertheless the facts on which a Federal court might have made findings of this sort were before the state court (I—10a). As illustrations, the District Court then quoted specific references to monopolistic and anti-competitive practices from the *Ripley* pleadings and the Referee's Report (I—10a-11a). Indeed, Railways in its present peti-

[2]References such as above are to the pages of the appendix to the petition in No. 1217 at this Term.

tion before this Court in No. 1217 provides numerous instances of alleged antitrust violations found in the *Ripley* record (Petition in No. 1217 pp. 7-14).

To illustrate the pervasiveness of the present antitrust claims in the original *Ripley* state case, it may be enough for the purposes of this petition to quote the following findings from the Referee's decision in *Ripley:*

> "D109. The natural consequence of charging CAG [Compania Agricola de Guatemala, a wholly-owned subsidiary of defendant United] less than the public for the haulage of bananas from Western Guatemala, was to deter shipments of banana competitive to CAG." [III—141a]
>
> "B301. At all times since 1904 it has been the policy of United to suppress the development of competitive production and purchasing of bananas in Guatemala for export." [III—56a]
>
> "B305. United has sought and utilized its control and domination over IRCA [Railways] to suppress competition in the banana business in Guatemala." [III—56a]

Again in the sixth claim of the present amended complaint (II-32-3) the same acts which are charged in the first four claims to constitute a violation of the Sherman Act are stated to have constituted also a violation of Section 7 of the Clayton Act, with particular emphasis on the 1928 and 1936 acquisitions by United and its subsidiary Compania Agricola de Guatemala of stock in Railways.

Both of these stock acquisitions were set forth in the *Ripley* amended complaint (pars. 6, 10 and 11, I—147a-48a, 149a-50a), and were coupled with allegations that United used that stock ownership to control the activities of Railways and to suppress competition.

The evidence before the District Court is full of recognition by plaintiffs in the *Ripley* case, acting in the name

and right of the present plaintiff, that the antitrust claims now presented in this case for purposes of a further and multiple recovery were fully known to plaintiff's representatives in *Ripley* as early as March 1950. The moving affidavit of Porter R. Chandler (I—26a et seq. and the deposition of M. Victor Leventritt (D. App. 1a-48a),[3] one of appellant's principal lawyers both in *Ripley* and here, are illustrative. Mr. Leventritt, one of the *Ripley* attorneys who signs the petition in No. 1217, acknowledged that the *Ripley* trial developed material "which made it appear that the United Fruit Company had engaged in violations of antitrust laws of the United States. This was an inevitable by-product of the trial." Mr. Leventritt and his associates, then representing Railways' stockholders, concluded that the proper forum for any antitrust action against United was the Federal court rather than the state court, and gave consideration to advising the bringing of an antitrust suit at that time in the Federal courts (D. App. 26a-27a).

A summary of the evidence on this subject by the District Court may be found at I—16a, 254 F. Supp. at 239.

Reference may also be made to the institution of a separate action by one of the *Ripley* plaintiffs and another Railways' stockholder against United's subsidiary Compania Agricola in the United States District Court for the District of Delaware on March 30 1953 (D. App. 30a-34a). *Henis* v. *Compania Agricola* 116 F. Supp. 223, aff'd 210 F. 2d 950 (CA 3 1954); cf. Chandler affidavit (I—33a-34a). This included an attack on the 1936 acquisition by Agricola of the same 185,000 shares of Railways' stock which is now attacked as a violation of the Clayton Act in pars. 20 and 80 of the present amended complaint (II—9, 33).

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[3]Reference is to Defendant-Appellee's Appendix in the Court of Appeals filed with this Court in No. 1217 at this Term.

Reasons for Granting the Writ

In our brief in opposition to the Railways' petition in No. 1217, we argue, in summary, that the action of the Court of Appeals in affirming the granting of partial summary judgment on the basis of the statute of limitations was correct and presents no question appropriate for review by this Court, and that the petition in No. 1217 should accordingly be denied. In this present cross-petition, we urge that the Court of Appeals should also have affirmed the granting of partial summary judgment on the basis of the rule against splitting of claims, further narrowing the claims against United remaining for trial.

1. The close interrelationship of the statute of limitations and splitting defenses in the record and Court of Appeals opinion and fairness to the parties require the granting of this petition if the petition in No. 1217 is granted. The present situation is not one in which correct disposition of the case turns on some major issue of constitutional or statutory construction which can be extracted and considered in isolation from other points correctly decided below. Rather, this is an unusually complex interrelated dispute between two private parties turning on procedural questions, of which that raised by this petition is at the very least as significant as the points urged by Railways in No. 1217. In this posture, we believe that if the Court grants the petition in No. 1217, then this petition should also be granted and the case considered as a whole.

2. The decision of the Court of Appeals with respect to the rule against splitting claims or causes of action raises important questions of principle. It indicates a line of demarcation between the scope of state court decisions and the scope of decisions under the antitrust laws which

threatens an undesirable and unnecessary multiplication of litigation.

3. The well-established and desirable policy adverse to piecemeal litigation is exemplified by a long line of decisions in this Court establishing the general rule against splitting of claims. Such decisions include *U. S.* v. *California & Oregon Land Co.* 192 US 355 (1904); *Baltimore S.S. Co.* v. *Phillips* 274 US 316 (1927); *Grubb* v. *Public Utilities Commission of Ohio* 281 US 470 (1930). Accord: *Chicot Co. Dist.* v. *Baxter State Bank* 308 US 371 (1940). Mr. Justice Holmes thus articulated the rule, 192 US at 358:

> "It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi* . . . But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim . . . and, *a fortiori,* he cannot divide the grounds of recovery."

In *Baltimore S.S. Co.,* this Court said, 274 US at 320:

> "The same general doctrine is stated in Stark v. Starr, 94 U. S. 477, 485, 24 L. ed 276, 278, that 'a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.' "

The wisdom and policy of the rule are thrown into sharp relief by the record below. Not only are the damages claimed on the basis of the transactions previously tried in the state court, now enormous in amount, but the claims asserted on the basis of those transactions are made to reach back to 1904 and carry forward for a period of 58 years. The appellate record emanating from the trial in the *Ripley* case was of prodigious and practically unprecedented length. The burdensomeness for litigants of a departure now from the rule against splitting of claims, is manifest from this record.

4. The decision of the Court of Appeals on the splitting point appears to depart from the rationale of the courts of appeal in comparable cases in four other circuits, as respects antitrust causes of action. *Engelhardt* v. *Bell & Howell Co.* 327 F. 2d 30 (CA 8 1964); *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.* 295 F. 2d 362 (CA 5 1961); *Williamson* v. *Columbia Gas & Electric Corp.* 186 F. 2d 464 (CA 3 1950) cert. denied 341 US 921 (1951); *F. L. Mendez & Co.* v. *General Motors Corp.* 161 F. 2d 695 (CA 7 1947) cert. denied 332 US 810 (1947). In each of these cases Federal treble damage antitrust claims were held barred by an earlier judgment seeking, as here, damages for the same injury but alleging a different theory of recovery. Early in the history of the Sherman Act, the same principle was applied in the Second Circuit although no longer favored there. Compare *Straus* v. *American Publishers' Assn.* 201 Fed. 306 (CA 2 1912) with *Lyons* v. *Westinghouse Electric Corp.* 222 F. 2d 184 (CA 2 1955).

The characterization in *Lyons* of *Straus* as not a valid precedent and the reaffirmance of that view by the Court of Appeals in this case (App. 21a) creates a conflict of the decisions in the Second Circuit with the decisions in

the Third, Fifth, Seventh and Eighth Circuits regarding the applicability to antitrust claims of the general principle against splitting of claims.

Conclusion

For the reasons stated, if the petition in No. 1217 is granted, this petition should be granted also and the cases consolidated for argument.

Dated: New York, New York
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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1320

UNITED FRUIT COMPANY,

Petitioner,

against

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1320

UNITED FRUIT COMPANY,

Petitioner,

against

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

We have filed a separate brief, in behalf of plaintiff, International Railways of Central America (IRCA), in reply to the opposition of defendant, United Fruit Company (United) to IRCA's Petition, this Term, No. 1217.

We submit herewith IRCA's opposition to United's Cross-Petition on the ground that it is without substance, intended only as a red herring across the trail of IRCA's Petition in No. 1217.*

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* REFERENCE CODE: References such as "I-106a" are to the Roman numbered volumes, of which there are four, and to the pages thereof, of our ["Plaintiff-Appellant"] Appendix in the Court of Appeals filed with this Court at the time of our Petition, this Term, No. 1217.

References such as "App. 20a" are to the pages of the Appendix at the end of our said Petition.

Opinions Below

See IRCA's Petition, this Term, No. 1217, page 1. The opinion of the Court of Appeals has now been reported in 373 F. 2d 408.

Jurisdiction

See IRCA's said Petition, page 1.

Statutes and Rule

See IRCA's said Petition, page 1.

Question Presented on United's Cross-Petition

Are the claims for violation of the federal antitrust laws barred by *res judicata*—splitting a cause of action, by reason of a prior New York Supreme Court judgment which adjudicated only state created claims for a breach of fiduciary obligation where

(i) the New York courts declined jurisdiction over the antitrust claims because vested exclusively in the federal courts,

(ii) under local New York law, the state court judgment is not *res judicata* of the antitrust claims,

(iii) many of the transactions complained of are different,

(iv) the defendant, United, by pleading *res judicata*, seeks to take advantage of its own wrong, *viz.* exercising

management control over the plaintiff, IRCA, to prevent the corporation from suing United in the federal court;

(v) when the state court action was instituted by certain stockholders of the present plaintiff, they were not on notice of the antitrust violations.

Statement of the Case

See IRCA's Petition, page 4, *et seq.*

Argument

A. A number of well-settled rules are each fatal to United's contention that the New York State judgment (in *Ripley*) against it for breach of fiduciary obligation bars the present exclusively federal treble-damage action against it for violation of the antitrust laws.*

1. Because federal law is paramount, a state court judgment on a state claim does not bar subsequent prosecution of an exclusive-federal claim. *Pepper* v. *Litton*, 308 U. S. 295 (bankruptcy); *Lyons* v. *Westinghouse*, 222 F. 2d 184, 189, 195 (C. A. 2) (antitrust); *Klein* v. *Amer. Luggage Works*, 206 F. Supp. 924, 935 (D. Del.), revd. on another ground, 323 F. 2d 787 (C. A. 3) (antitrust); *Vanderveer* v. *Erie Malleable Iron Co.*, 238 F. 2d 510, 513-4 (C. A. 3) (patent infringement); *Western Boat Bldg. Co.* v. *Leary*, 198 F. 2d 409, 411 (C. A. 9) (maritime workmen's compensation); *Newport News Shipbuilding & Drydock*

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* The *Ripley* state court declined jurisdiction over the treble damage antitrust claims (App. 20a) because jurisdiction over them is entrusted exclusively to the federal district courts. *Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 451, n. 6.

Co. v. *O'Hearne,* 192 F. 2d 968, 971 (C. A. 4) (same).* This is particularly so, here, where Congress granted an entirely different remedy, *viz.,* triple damages, one-third "civil" and two-thirds "punitive", to encourage private enforcement of the public policy against monopolization and conferred jurisdiction over it exclusively to the federal courts to ensure uniform administration, *Lyons, supra,* at 189.

Our case is even stronger than *Lyons,* for there the state court took (limited) jurisdiction over the federal claim, whereas in *Ripley* the state court declined all jurisdiction over the antitrust claims. As Judge Clark (of the Second Circuit) held, in an antitrust case, in overruling a plea of *res judicata* based on a state court judgment involving the same transaction:

> "Of course no judgment can be conclusive as to issues denied adjudication in the action in which it was rendered." *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.,* 194 F. 2d 484, 489 (C. A. 1).

Congress, in giving the federal courts exclusive jurisdiction over the antitrust claims, did not intend to take away from state courts their common law and equity jurisdiction; as, for example, over the claims for breach of fiduciary obligation involved in *Ripley,* even where those federal and state claims might involve the same subject matter. *Red Rock Cola Co.* v. *Red Rock Bottlers, Inc.,* 195 F. 2d 406 (C. A. 5). Congress has thus effected the "fragmentation of these claims", *Southern Construction*

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* Of course, the federal court will accept specific material findings made in the state case, *Heiser* v. *Woodruff,* 327 U. S. 726; *Lyons* v. *Westinghouse,* 222 F. 2d 184, 196 (C. A. 2); *Connelly* v. *Balkwill,* 174 F. Supp. 49, 56, 60-62 (N. D. Oh.) affd. on op. below, 279 F. 2d 685 (C. A. 6).

Co. v. *U. S.*, 371 U. S. 57, 60, is any fragmentation there be, and where that is so, there is no room for holding that they are parts of a single cause of action for purposes of the no-splitting rule. Cf. *Southern Construction Co., supra.* Not only is United's contention in defiance of settled law under the authorities set forth above; if sustained, its consequences would indeed be pernicious.

On the one hand, collusive or ill-advised actions by litigants in state courts on state claims would have the effect of frustrating or frittering away fundamental federal policies favoring exclusive jurisdiction in the federal courts of antitrust rights..

On the other hand, insofar as the ruling contended for would compel many litigants to come to federal courts *first* with state claims, to avoid any risk of losing federal rights that might be lurking somewhere in the facts, it would be a grab for federal jurisdiction over state claims, which is against our whole tradition.*

2. Since New York has no jurisdiction over federal antitrust claims, IRCA cannot, consistently with due process, be denied an opportunity to litigate those claims in an appropriate tribunal. *Griffin* v. *Griffin*, 327 U. S. 220. See *Magnolia Petroleum* v. *Hunt*, 320 U. S. 430, 444: "The fact that a suitor has been denied a remedy by one state because it does not afford a remedy for the particular wrong alleged, may not bar recovery in another state which does provide a remedy." And see *Williams* v. *Murdoch*, 330 F. 2d 745, 752 (C. A. 3): "there can be no res judicata" where plaintiff "did not have an opportunity to be

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* See e.g. *DiGiovanni* v. *Camden Fire Insurance Assn.*, 296 U. S. 64, 73; *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 496; *Looney* v. *Eastern Texas R.R.*, 247 U. S. 214, 221; *Toucey* v. *N. Y. Life Insur. Co.*, 314 U. S. 118, 141.

heard." Accord: *Fayerweather* v. *Ritch*, 195 U. S. 276, 299.*

3. A judgment not *res judicata* by the law of the state of rendition is not *res judicata* in the federal court. *Wright* v. *Georgia R. & Bkg. Co.*, 216 U. S. 420, 429: "This court, as is well-settled, accords to a judgment of a state only that effect given to it by the court of the state in which it was rendered [citations]."** By the local law of New York, since the antitrust claims were excluded by the *Ripley* court as not within the issue (App. 20a), they are open for determination in another action, even assuming *arguendo* that both actions arise out of the same subject-matter. *Hasset* v. *Rathbone*, 204 App. Div. 229, 231 (3d Dept.); 2 Freeman on *Judgments* (5th ed.) § 704, pp. 1485, 1485-6, 1487-8; § 705, p. 1491.*** Indeed, United's success in ex-

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* See also L. Hand, J., in *Lyons, supra*, 222 F. 2d, at 189: "We are in accord with what Judge Goodrich says about the doctrine of res judicata in general, . . . : 'Such a rule of public policy must be watched in its application lest a blind adherence to it tend to defeat the even firmer established policy of giving every litigant a full and fair day in court.'"

** *Accord*: *Oklahoma Packing Co.* v. *Oklahoma G. & E. Co.*, 309 U. S. 4, 8; *St. John* v. *Wisconsin Emp. Rel. Bd.*, 340 U. S. 411, 414; cf. *Ind. Com. of Wis.* v. *McCartin*, 330 U. S. 622; *Chi., Rock Island & Pac. Ry.* v. *Schendel*, 270 U. S. 611, 622 [No. 684].

*** This is particularly so where, as here, the state court's ground for holding those claims not within the issue was lack of jurisdiction over the subject matter (a defect not correctible by the state courts); see 1B Moore, *Federal Practice*, § 0.405[5]. Thus, the Restatement of Judgment observes that "where a plaintiff brings an action in a State in which the courts have jurisdiction only with reference to one portion of his cause of action, he is not barred from maintaining an action in a proper court for the other portion." Sec. 62, com. k, p. 255. For example, judgment *in rem* against defendant's property in New York does not preclude a personal action against defendant, in California, for the balance of the debt. *Kane* v. *Cook*, 8 Cal. 449, 455 (Field, J.).

In *Dana* v. *Morgan*, 232 Fed. 85, 89 (C. A. 2), the Court held that a judgment in a derivative stockholder action precluded subsequent suit by the corporation only as to matters which "might have been presented to the court and passed upon therein."

cluding antitrust violations from the *Ripley* case, as not there in issue (I-105a; I-102a-105a), estops it from claiming that *Ripley* is *res judicata* of those claims here. *Virginia-Carolina Chemical Co.* v. *Kirven,* 215 U. S. 252, 259.

4. United is estopped from pleading *Ripley* as *res judicata* of federal claims because United's wrongful domination over IRCA (see IRCA's Petition, this Term, No. 1217, p. 21) prevented IRCA from selecting an appropriate forum in which to prosecute its antitrust claims against United. *Glus* v. *Brooklyn Eastern District Terminal,* 359 U. S. 231, 232-3:

> "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts."

This is particularly so, since in 1949 when certain stockholders commenced *Ripley,* they were not on notice of the antitrust violations. By the time they became aware of them through pre-trial discovery in the state court proceeding, it was too late for the stockholders to start over again in federal court (a) for financial reasons, (b) because the New York statute of limitations had run, in the meanwhile, on part of the state claims and (c) because, at least then, the Court of Appeals for the Second Circuit was not permitting pendent jurisdiction over such state claims, as evidence was needed to sustain them "not relevant to and needed to support their first (federal) claim", *Zalkind* v. *Scheinman,* 139 F. 2d 895, 899 (C. A. 2, 1943); *Kleinman* v. *Betty Dain Creations,* 189 F. 2d 546 (C. A. 2, 1951).*

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* In 1952, the Second Circuit relaxed the *Zalkind* test of pendent jurisdiction involved in patent, copyright and trademark claims

(Footnote continued on following page)

5. The transactions here are also different from those adjudicated in *Ripley*.

In *Ripley* the only transactions adjudicated on the merits were payments to IRCA for shipments actually made over IRCA by United and by coffee export shippers.

The present suit deals also with the following entirely different transactions:

(a) shipments not made over IRCA by *independents* because suppressed by United;

(b) shipments not made over IRCA by United because suppressed by United;

(c) shipments over IRCA by independent import shippers;* and

(d) acquisitions of IRCA stock.**

(Footnote continued from preceding page)

within 28 U.S.C.A. § 1338(b), but *as late as 1963* had still left open whether the *Zalkind* test would be made less rigorous for other claims. *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F. 2d 538, 544 (C. A. 2, 1956); *Hazel Bishop, Inc.* v. *Perfemme, Inc.*, 314 F. 2d 399, 403 (C. A. 2, 1963).

Many facts were required to support the state, but not the federal, claims, see 8 A. D. 2d at 319-328; 8 N. Y. 2d at 437-455.

Diversity jurisdiction was not available, as IRCA and United were both New Jersey domiciliaries, as was Liddell, the most important plaintiff stockholder, holding the oldest stock. Waterman, an old stockholder, intervened in 1952 but it would have been imprudent to drop Liddell as there was no assurance the latecomer would remain loyal, retaining his stock to the end of the litigation.

* It may be noted that *Ripley* dismissed, "without prejudice", the claim as to independent import shipments; so that claim is for this additional reason not foreclosed; see Restatement of Judgments, § 53, page 206.

** For a detailed contrast between the claims adjudicated by *Ripley* and those in the present case, see I-106a-114a.

Different material transactions spell different claims or causes of action for purposes of the no-splitting rule, App. 19a-20a:

> *Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N. Y. 304, 309: "The cause of action being different, i.e. for coal sold at other times and in response to other orders."*

6. *Henis* v. *Compania Agricola*, 210 F. 2d 950 (C. A. 3), aff'g 116 F. Supp. 223, on one ground only—although referred to in the Cross-Petition's statement of the case (p. 8)—has nothing to do with any issue in this case. The Court of Appeals there confined its decision to one matter; namely, that the two plaintiff stockholders of IRCA in that case, who had bought their stock *in 1951*, had shown no legal capacity under Federal Rule of Civil Procedure (now) 23.1 to bring any action in behalf of IRCA to compel the restoration of stock and notes sold by IRCA *in 1936*. The Court, accordingly, refused to consider the applicability of the Delaware statute of limitations, the other ground upon which the District Court had based its decision. The Court of Appeals' holding, pertaining to the incapacity of stockholders, adjudicated no IRCA cause of action. Its express refusal to pass on the Delaware statute of limitations issue deprived the District Court holding thereon of any *res judicata* effect whatsoever. Restatement, *Judgments*, page 308.**

Moreover, Judge Leahy in the District Court was passing on a *Delaware* statute of limitations applicable to a *State* cause of action and this in no event could bar a *fed-*

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* *Accord*: *Ross* v. *T. C. Bateson Construction Co.*, 270 F. 2d 796, 799, 800 (C. A. 5); *Glaser* v. *Connell*, 266 F. 2d 149, 153 (C. A. 9); Restatement, Judgments, § 62, pages 247-8.

** "Where the trial court bases the judgment upon two alternative grounds, and an appellate court affirms the judgment solely on one of the grounds, the judgment is not conclusive in a subsequent action in which the other ground is in issue."

eral cause of action, with a federal limitations statute, brought in any District.*

B. None of the cases cited in the Cross-Petition (10-11) supports United's position. In each of those cases decided by the Supreme Court, and by the Third, Fifth, Seventh, and Eighth Circuits, the plaintiff had a full opportunity to present all his grounds to the first court; in addition, in each, the same transaction was presented in both actions.

Contrary to United's statement in the Cross-Petition (11), the decision of the Court of Appeals below on United's splitting point does not depart from the rationale of the courts of appeal in the four cited circuits. Thus, *Englehardt,* the case cited from the 8th Circuit, expressly distinguished *Lyons* on the ground that in *Engelhardt,* unlike *Lyons,* both cases had been in the federal court. 327 F. 2d, at 35. And in *Williamson,* the case cited from the 3rd Circuit, where, also, both actions—for violation of the antitrust laws—were in the federal court, Judge Goodrich pointed out, 186 F. 2d, at 469, that the "force of the rule is still operative", that

> "If the theory in the second suit was unavailable under the writ used in the first suit, the plaintiff had no opportunity to litigate it there and so plaintiff was not barred by res judicata."

Even if *Straus* had not been overruled by *Lyons*—and the overruling confirmed below (App. 21a)—it would not support United's position: in *Straus* (see 201 Fed., at 310), unlike the case at bar, the specific issue of violation of the federal antitrust laws, which was sought to be litigated in the federal court, had already been litigated and determined on the merits against the plaintiff, in the state court.

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* Restatement of Judgments, pp. 194-195; *Ripley,* 8 A. D. 2d 310, 324; *Williamson* v. *Columbia Gas & Electricity Corp.,* 186 F. 2d 464, 466 and note (C. A. 3).

CONCLUSION

United's Cross-Petition—without substance and intended only as a red herring across the trail of the Petition in No. 1217 filed by IRCA—should be denied.

Dated: New York, New York, May 9th, 1967.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1217

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Petitioner,

v.

UNITED FRUIT COMPANY,
Respondent.

MOTION FOR LEAVE TO FILE AND A PETITON FOR REHEARING OF AN ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OF AN ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner-plaintiff International Railways of Central America ("IRCA") so moves on the following grounds:

1. Overwhelming evidence proving what defendant conceded, disproving what the Court found and, at least, raising a triable issue in an antitrust action, now being offered because the Court of Appeals surprised petitioner-plaintiff by a decision on an issue first raised in its opinion, upon which petitioner-plaintiff had no opportunity to introduce evidence in opposition to defendant's motion for summary judgment (manifest injustice and substantial grounds available to petitioner although not previously presented).

2. Subsequent decision of the Court of Appeals for the Second Circuit in the same term directly inconsistent with the decision in our case demonstrating the error committed in drawing inferences in favor of the party *moving* for summary judgment and placing the burden of proof on the party *opposing* the motion (intervening circumstances of substantial or controlling effect and manifest injustice).

Dated: December 14, 1967.

Respectfully submitted,

M. Victor Leventritt,
Attorney for Petitioner.

PETITION FOR REHEARING OF AN ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement and Opinions Below

This is petitioner-plaintiff International Railways of Central America's ("IRCA"), first petition for rehearing filed in this Court; it is submitted in good faith and not for reasons of delay.

The United States District Court for the Southern District of New York granted respondent-defendant United Fruit Company's ("United") motion for summary judgment on the grounds of *res judicata* and statute of limitations on antitrust violations (254 F. Supp. 233); it is printed in petitioner's Appendix I, 5a-21a.

On January 27, 1967 the Court of Appeals for the Second Circuit (373 F. 2d 408) (Appendix A hereto) affirmed the summary judgment on statute of limitations on a fact issue *newly created by it,* to wit, that plaintiff had failed to sustain its burden of proof:

> "that a demand on the IRCA directors for the institution of a treble damage action between May, 1959 and February, 1961 . . . would necessarily have been fruitless." (App. 15a).*

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* The Court of Appeals reversed the ground of *res judicata* and *refused to answer* the "more difficult question" of law on statute of limitations decided in the district court and presented to the Court of Appeals:

> "whether or under what circumstances the *mere possibility* of [an antitrust] suit by an informed stockholder or director would end tolling due to 'domination' of a corporation [IRCA] by the alleged wrongdoer" [United Fruit] (App. 16a).

The Court of Appeals erred:

1. (a) in deciding defendant's motion for summary judgment upon a fact issue that had never been presented to the district court or Court of Appeals,

   (b) without giving plaintiff an opportunity to introduce evidence on that new fact issue,

   (c) by making said fact finding in favor of the defendant even though it was squarely inconsistent with defendant's own concession; defendant *had conceded,* for purposes of its motion, that its domination of plaintiff in the relevant period would have been sufficient "to prevent Railways from bringing an action [against defendant] *in its own name*" (App. 32a) and that a demand on the plaintiff's directors to sue defendant would have been a "useless and futile act." (App. 32a) The Court of Appeals directly contrary to that concession found that plaintiff had failed to show "that a demand . . . would necessarily have been fruitless" (App. 15a), and

2. by drawing inferences in *favor* of the party *moving* for summary judgment in flagrant violation of the established law, and by placing the burden of proof on the party *opposing* the motion.

Plaintiff filed a petition for a writ of certiorari and defendant filed a conditional Cross-Petition. On May 22, 1967, this Court denied both petitions (18 L. Ed. 2d 975). On October 25, 1967, plaintiff filed a motion for leave to file a petition for rehearing in the Court of Appeals; on November 3, 1967, that motion was denied, without opinion.

Reasons for Motion and Petition

1. Plaintiff summarizes below overwhelming evidence it has never been afforded an opportunity to tender to the district court and the Court of Appeals because the Court of Appeals surprised plaintiff and granted summary judgment on the fact issue of "lack of demand" and "domination" without plaintiff knowing it was ever in issue. As this Court so appropriately stated in *Hormel* v. *Helvering*, 312 U. S. 552, 556:

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplated that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; *it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.*"

That error by the Court of Appeals was compounded in that it was not reviewing a complete trial record but an abbreviated record on a motion for summary judgment not intended to cover said fact issues.

Plaintiff's overwhelming evidence* would prove what United had conceded and disprove what the Court found and, at least, raise a triable issue:

> (a) In 1958, after the Referee's decision in the State Court derivative action in *Ripley*, stockholders of plaintiff made a demand on a director and IRCA's counsel that pursuant to the final judgment in the

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* Plaintiff's overwhelming evidence it never had an opportunity to offer is contained in Appendix B, pp. 24a-31a.

government's antitrust suit against United, IRCA collect from United the same rates that were paid by others. That demand was refused (App., pp. 24a-25a).

(b) Contra the Court of Appeals, the principal reason the directors of IRCA supported plaintiffs-stockholders' request for higher damages on the State Court appeals in *Ripley* is that they had *"no option"*, otherwise they would "lay [them]selves open to attack for personal liability" (App., p. 26a).

(c) After the Referee's decision in *Ripley* holding that there was complete domination of IRCA's directors by United, certain IRCA directors, in late 1958 and early 1959, made repeated attempts to have United carry out their "concrete suggestions" to cure the *unsatisfactory management relationship* between IRCA and United; United failed to respond; then six out of the eleven IRCA directors, instead of fighting United, took the easy out and resigned or refused to stand for reelection in 1959. United's domination of IRCA thereafter became even more direct and open with Mr. James McGovern, *United's* General Attorney, taking the office of Chairman of the IRCA board (App., pp. 26a-28a).

(d) After Mr. McGovern became IRCA's Board Chairman in 1959, Sullivan & Cromwell resigned as IRCA's general counsel; that resignation was accepted as to all matters but the *Ripley* case in the State Court; Mr. McGovern directed that "Sullivan & Cromwell not be consulted as counsel"; and all legal matters not dealing with the State Court suit were directly controlled by Mr. McGovern (App., p. 24a).

(e) In both 1958 and 1959, independents attempted to take control of IRCA and lost (App., pp. 28a-30a).

(f) At least after 1958, IRCA was not making any money on United's bananas shipped from the west

coast of Guatemala and did nothing about it. IRCA actually turned away profitable business to accept United's business at a loss. No independent management would have permitted such a situation to continue, especially where that unprofitable traffic was the single largest segment of its business (App., pp. 30a-31a).

2. On defendant's motion for summary judgment, the Court of Appeals erroneously placed the burden on plaintiff to "effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue." Plaintiff was therefore erroneously required to prove the negative on defendant's motion for summary judgment without knowing the fact was in issue, since it was already conceded by defendant.

The Court of Appeals made inferences of fact in favor of the *moving* party, *contrary* to well-settled law, *U. S.* v. *Diebold,* 369 U. S. 654 and *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464. Subsequent to the decision here by the Court of Appeals on January 27, 1967, that same court on July 13, 1967 in *Shinabarger* v. *United Aircraft, et al.,* 381 F. 2d 808, 810 (C A 2), applied the established law on summary judgment on the issue of tolling the statute of limitations, to wit, if one inference "viewed in the light most favorable to the party *opposing* the motion, supports his position, summary judgment is not proper", citing *Diebold, supra.* That left the decision on summary judgment in the present case standing alone.

Evenhandedness in the administration of justice requires that the "rules of the game" be applied uniformly for all litigants and not be changed in the middle of the case, as was done here. The result here is that plaintiff has been effectively denied its day in court on antitrust claims through 1961 under the erroneous application of summary judgment rules. This Court held it was error where the

Court of Appeals:

> "'*made an inference of fact directly in conflict with the stipulation of the parties* and the findings, for which we think the record affords no support whatever.'" (emphasis added) *Hormel* v. *Helvering, supra,* 558, quoting from *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200, 206, 207.

Likewise here, the Court of Appeals "made an inference of fact directly in conflict with the [concession of United]", which was tantamount to a "stipulation of the parties" for purposes of United's motion.

In *Poller, supra,* this Court held (468):

> ". . . This rule [56(c)] authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, *where it is quite clear what the truth is,* . . .' [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial . . . if they really have issues to try.'" (emphasis supplied)

In *Hormel, supra,* this Court stated (557):

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them."

Plaintiff has been misled to its prejudice. The Court of Appeals in its opinion recognized the fact that plaintiff might have been entitled to take evidence on the issue of "futility" and "domination" but stated that plaintiff had:

> "raised no objection either in the district court or here to disposition of UF's motion on the affidavits and records submitted, and it has not adverted to any further evidence that might be introduced on this point." (App. 15a, fn. 10)

Plaintiff made no objection nor did it advert to further evidence because a law issue was to be decided upon conceded facts. When the Court of Appeals rejected the conceded facts, plaintiff should have been afforded an opportunity to offer evidence on the new fact issue first created by the Court of Appeals. There lies further error and manifest unfairness to petitioner.

The motion for leave to file and a petition for rehearing under Rule 58(2) of the Supreme Court Rules are grounded upon "substantial grounds available to petitioner although not previously presented" (the overwhelming evidence) and "intervening circumstances of substantial or controlling effect" (the decision in *Shinabarger* in July, 1967) "justifying application of the established doctrine that 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules' ". *Gondeck* v. *Pan Am World Airways, supra,* 26; *United States* v. *Ohio Power Co., supra,* 99. Another ground is *"manifest injustice", Cahill* v. *New York, N. H. & H. R. Co.* (dissent), 351 U. S. 183, 188.

Plaintiff submits that the effective denial of due process of law, to wit, not to have its day in court and offer evidence is a "manifest injustice" that far outweighs considerations of finality of a judgment.

Plaintiff seeks its day in court, to wit, a trial initially on whether United dominated IRCA so that it prevented IRCA from suing United for antitrust wrongs committed by United.

Conclusion

The motion for leave to file the petition for rehearing should be granted; the petition for rehearing should be granted and the order denying certiorari vacated; the petition for certiorari should be granted; the judgment of the Court of Appeals should be reversed and this matter remanded to the district court for a trial.

December 14, 1967.

Respectfully submitted,

M. Victor Leventritt,
Attorney for Petitioner.

Of Counsel:

Aaron Lewittes,
Sidney Bender,
Abraham K. Weber.

Certificate of Counsel.

The undersigned, attorney for petitioner-plaintiff International Railways of Central America, hereby certifies that the foregoing motion for leave to file a petition for rehearing and the petition for rehearing are presented in good faith and not for delay.

M. VICTOR LEVENTRITT

APPENDIX A

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 178—September Term, 1966.

(Argued November 29, 1966 Decided January 27, 1967.)

Docket No. 30638

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff-Appellant,

—v.—

UNITED FRUIT COMPANY,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*

FRIENDLY and SMITH, *Circuit Judges.*

Appeal by plaintiff, in an action in the District Court for the Southern District of New York for treble damages under the antitrust laws and other relief, from an order, Sylvester J. Ryan, *Judge,* 254 F. Supp. 233, granting a motion for partial summary judgment by defendant and denying such a motion by plaintiff. Order granting defendant's motion affirmed in part and reversed in part; order denying plaintiff's motion affirmed.

Opinion of Court of Appeals.

AARON LEWITTES (Leventritt, Bush, Lewittes & Bender, New York, N. Y.) (M. Victor Leventritt, Sidney Bender, Abraham K. Weber, of Counsel), *for Plaintiff-Appellant.*

RALPH M. CARSON (Davis Polk Wardwell Sunderland & Kiendl, New York, N. Y.) (Porter R. Chandler, Robert F. Dobbin, of Counsel), *for Defendant-Appellee.*

FRIENDLY, *Circuit Judge:*

This action was brought on February 16, 1965, by International Railways of Central America (IRCA) against United Fruit Company (UF) in the District Court for the Southern District of New York. The complaint, analyzed in more detail below, asserted six claims, the first four and the sixth seeking treble damages for breach of the antitrust laws, 15 U. S. C. § 15, and the fifth, predicated on the same facts as the third, primarily seeking damages for breach of contract. The asserted damages, going back in some instances to 1928, when trebled were in excess of a half billion dollars.

UF moved for summary judgment (1) dismissing the first, second, fourth and sixth claims and so much of the third and fifth as related to matters occurring before 1961, on the ground that their prosecution was barred by the final judgment awarding damages through December 31, 1960, in a derivative action brought in the New York courts by stockholders of IRCA (hereafter "the *Ripley* action") against that company as a nominal and UF as the real defendant; and (2) dismissing so much of the claims (other than the fifth insofar as it was based on alleged breach of contract) as related to matters occurring before February 16, 1961, as barred by the four-year statute of

limitations for antitrust actions, 15 U. S. C. § 15b. Plaintiff countered with a motion for partial summary judgment as to UF's liability on the first, second, fourth and sixth claims and also as to damages on the second and sixth, mainly on the basis of the record and judgment in the *Ripley* action. Judge Ryan granted both branches of UF's motion and denied plaintiff's, 254 F. Supp. 233 (1966). A judgment was entered which made the recitals appropriate under Rule 54 with respect to the grant of defendant's motion and contained certification under 28 U. S. C. § 1292(b); we granted leave to appeal so that the entire matter might be before us.

I.

A statement, necessarily condensed, of the relations of the parties and of previous litigation is essential to understanding. For the former we draw largely on the findings made by the referee in the *Ripley* action in 1957, which were affirmed by the hierarchy of New York courts.

IRCA operates the most important railroad in Guatemala, running across the country from Puerto Barrios on the Caribbean, the principal seaport, with one branch veering southward into El Salvador and another extending from western Guatemala north to the Mexican border. From its incorporation in 1904, IRCA's fortunes were closely linked to UF's banana business in Guatemala, initially in the east. The importance of the two companies to each other increased when, in the 1920's, UF became convinced of the desirability of expanding its plantations around Tiquisate in western Guatemala.

In 1928 a syndicate including UF and banking firms purchased the interest of IRCA's dominant shareholder, Minor C. Keith, this making UF, with 71,000 shares of common stock, the largest single shareholder. The stock purchased by the syndicate was placed in a voting trust under which

UF, through a trust company as its agent, nominated two of the five trustees. In fact UF took over control of IRCA, although its stock ownership was concealed. By the mid-1930's its interest in western Guatemala and consequently in IRCA increased; its new president, Zemurray, made known that UF would pursue its development plans only if its control of IRCA was solidified, for the double purpose of insuring continuation of the favorable freight rates and service on its own products and of preventing similarly favorable rates to competitors. In 1936, Compania Agricola de Guatemala, S. A. (Agricola), a wholly owned subsidiary of UF, acquired 185,000 shares of unissued IRCA common stock at a low price and the voting trust was dissolved. UF's 256,000 common shares then constituted 42.68% of IRCA's total voting stock, 500,000 shares of common and 100,000 of preferred. At the same time contracts relating to rates and many other matters were executed.

From this time UF could and did control the election of IRCA's nine directors, although it regularly allowed the banking interests to submit four nominees for its approval. UF's control was exercised even more potently by the designation, from 1928 on, of the officer in charge of its tropical operations as "special advisor" to IRCA's board, chairman and president. For many years, the extent of UF's stock ownership and dominance of IRCA was concealed.

As indicated, UF's most important interest in IRCA was in having low freight rates and special services for its own products and in denying these to its competitors. On banana shipments from western Guatemala, UF for many years paid only $60 per car, performing the wharfage service and loading at Barrios with its own labor, whereas independents paid $130 per car for the line haul and about $72 for wharfage and loading, on which IRCA made a

profit. For bananas from eastern Guatemala, UF was charged 11½ or 12 cents per stem as against 20 cents for independents. On imports through Barrios to western Guatemala IRCA charged the public $350 or more per carload as against $60, later $100, to UF. In numerous instances IRCA, at UF's instance, denied to independente services comparable to those furnished its controlling stockholder.

In May, 1948, meetings were held between an attorney representing IRCA stockholders, and the President and Chairman of the Board of IRCA, to consider IRCA-UF relations and rates. When the conferences proved unproductive, Ripley and other stockholders represented by the attorney brought a derivative action in the Supreme Court, New York County, in February, 1949. A year later the Appellate Division sustained the complaint except for such portions as related to matters occurring before February 4, 1943, which were held to be barred by the six-year statute of limitations. *Ripley* v. *International Railways of Central America*, 276 App. Div. 1006, 95 N.Y.S. 2d 871 (1st Dept. 1950). After service of an amended complaint, denial of a motion challenging its sufficiency and extensive discovery, trial was begun in 1953 before Mr. Justice Hammer and, after his retirement, was continued before him as a referee.

In a long report and decision, filed in June, 1957, the referee concluded that plaintiffs had established a breach of fiduciary duty by UF. He fixed rates for the carriage of the bulk of UF's traffic at considerably more than what IRCA had collected but less than those charged to independents.[1] Although at the trial IRCA had opposed the

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[1] For west coast bananas he directed that the $75 per car rate voluntarily made effective in January, 1948 should be applied retro-

(Footnote continued on following page)

plaintiffs and supported UF, because of fear that judgment for the plaintiffs might enable UF to terminate the complex of contracts executed in 1936, the referee's conclusion as to the severability of the rate arrangements led it to join plaintiffs in appealing on the ground that the award of damages was inadequate. The Appellate Division rejected this argument as it did the many grounds urged by UF for reversing the award to IRCA, *Ripley* v. *International Railways of Central America*, 8 A. D. 2d 310, 188 N.Y.S. 2d 62 (1st Dept. 1959), and the Court of Appeals affirmed, 8 N. Y. 2d 430, 209 N.Y.S. 2d 289 (1960). On March 1, 1961, the Supreme Court for New York County entered a supplemental judgment assessing damages for 1956-60 in the sum of $3,309,670.39, with interest.

In preparing for and conducting the trial of the *Ripley* action, an attorney for the plaintiff stockholders became aware of evidence which in his view demonstrated antitrust violations by UF, and mentioned this to a Justice Department attorney toward the end of 1951. In 1954, the United States filed a civil complaint under the antitrust laws against UF in the Eastern District of Louisiana. This action terminated early in 1958 in a consent decree,

(Footnote continued from preceding page)

actively to January 1, 1946, that the rate for 1948 should be $80, and that this should rise $5 annually through 1955. For east coast bananas he directed that the 15⅓ cent per stem rate which had applied from 1920 to 1930 should be restored from 1943 through 1955. For import traffic he directed an increase of 10% per car for 1947 and for each year thereafter through 1955. As to other items, he found plaintiffs had not adequately proved damages. He expressed the opinion that "equity and fair dealing indicate, and no doubt will require, similar annual rateable increases" for the cross-country traffic "until the rates equal those fixed for the general public (or so-called independent), shippers." The judgment entered December 19, 1957, translated these figures into dollar amounts aggregating $4,531,055.38, including interest, established rates from January 1, 1956, in accordance with the above, and contained an appropriate reservation of jurisdiction for the future.

one section of which required UF to dispose of its IRCA stock not later than June 30, 1966. In January, 1962, UF sold substantially all such stock to BSF Company which in turn sold the great bulk of this to Trans Caribbean Airways; the latter has purchased additional stock so that it owns 340,000 of IRCA's 500,000 shares of common. Later, UF advised it was abandoning Tiquisate and would no longer ship bananas from western Guatemala over IRCA, as the latter claimed it was bound to do through 1967. IRCA then sought the advice of attorneys who had been of counsel to the *Ripley* plaintiffs. This action followed, on February 16, 1965.

We conclude this history with a summary statement of the six claims in the complaint:

First: loss of revenues and permanent damage to IRCA from UF's repressive tactics which prevented other bananna shippers from using IRCA, 1928-61, $75,000,000.

Second: utilizing IRCA to facilitate UF's monopolistic designs by granting it discriminatorily low rates, 1928-61, $55,000,000 less the principal paid on the state court judgment.

Third: restricting UF's own banana shipments over IRCA, 1949-64, and disposing of its banana plantations in the Tiquisate area for other uses beginning in 1961, $24,000,000.

Fourth: monopolization of water transportation of Guatemalan coffee to the United States on a basis whereby total charges via Barrios were equalized with those from west coast ports of Guatemala and whereby IRCA was forced to charge higher rates on coffee not using UF ships, depriving IRCA of higher

rail revenues it could have obtained if there had been effective steamship competition, 1928-61, $15,000.000.

Fifth: breach of contract to ship west coast bananas (damages included in third claim).

Sixth: acquisition of control of IRCA by UF in violation of § 7 of the Clayton Act, 15 U. S. C. § 18 (damages equal to aggregate alleged in first four claims).

The total damages asserted, which may well contain some duplications, amounted to $169,000,000 and, when trebled to $507,000,000.

II.

We consider first the defense of the four-year statute of limitations for antitrust actions, 15 U. S. C. § 15b, which Judge Ryan sustained save as to the claim for breach of contract. IRCA asserts that the statute did not start to run on any of the antitrust claims until UF relinquished its domination in January, 1962, even though most of the facts had been spread on public records long before, and that the action, brought in February, 1965, was thus timely. UF responds that "domination" as a basis for tolling the statute with respect to an antitrust claim ceases to apply to a corporation once the facts giving rise to the action have become known to independent directors or stockholders since they can bring a derivative action for treble damages on the corporation's behalf, as held in *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 202 F. 2d 731 (2 Cir. 1953). It contends that this condition was here met as to stockholders not later than the annual meeting in March, 1952, when, after a thorough and heated airing of many

of the claims being advanced in *Ripley*, an opposition slate received some 204,000 votes as against 308,000 for the management, and as to directors in 1959 when three "independent" directors were elected to the IRCA board.* Plaintiff, not disputing that sufficient knowledge of the claims existed long before 1961, replies that it would be anomalous to bar the corporation because of a stockholder's or director's failure to do what the former was not bound to do and what neither might be able to do. Pointing to the thirteen years of starvation diet for the stockholders' lawyers in the *Ripley* action, it stresses the serious practical obstacles to undertaking derivative litigation against a powerful defendant, particularly one controlling the corporation, without the sinews afforded by the corporate treasury.

The closest that the Supreme Court has come to dealing with this vexing problem is *Curtis* v. *Connly*, 257 U. S. 260 (1921). This was a suit in equity by the receiver of a national bank against former directors for losses sustained by the payment of dividends out of capital and by improper loans and investments. The suit was brought August 2, 1916, and the six defendants whose liability was at issue had resigned by early 1910. Mr. Justice Holmes considered the suit to have been brought "upon the common-law right of the bank to recover for acts that diminished its assets,"

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*The three, Cunningham, Ruckle and Yaeger, were elected May 27, 1959, and remained as directors until 1963. Ruckle, a New Jeresy automobile dealer who had owned a substantial amount of IRCA stock since 1954, was invited by McGovern of UF to have his name on the management slate for 1959; so apparently was Cunningham. The record does not show the circumstances as to the nomination and election of Yaeger who had been on the opposition slate at the stockholders' meeting of 1952; however, in view of the absence of cumulative voting, it is inferable that he too was on the "management" slate even though known to be hostile to UF.

257 U. S. at 262,[3] and accordingly treated the case as governed wholly by the Rhode Island statute of limitations without considering possibly more extensive federal principles. The applicable Rhode Island statute was for six years with a proviso that "if any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against the person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence." The somewhat anthropomorphic view that "The bank, of course, must be charged with knowledge of what appeared upon its books," 257 U. S. at 262-63, disposed of the claims of concealment of illegal investments and, apparently, also of illegal dividends. The only point further discussed was the carrying of loans on the books at inflated values, as to which the "bank" itself would not perceive the error since the entries tallied with the amount of the loans and the concealment was simply the weakness of the borrower's credit. As to this, notice was found in the election of three new directors between 1909 and early 1910 who came to the board, admittedly with knowledge of the facts, "as the eyes of the bank." 257 U. S. at 264. The Supreme Court's opinion did not discuss, although those in the lower courts had, "the contention made, not with much apparent confidence, that the statute did not begin to run in favor of the retiring directors until the bank passed into the control of a board, the majority of whom had not participated in the wrongs alleged against the retiring members . . . ." *Curtis* v. *Connly*, 264 Fed. 650, 652-53

[3] We are not clear why this was so, since the bill apparently alleged acts constituting federal claims under Rev. Stat. § 5239, see the decision of the District Court, *Curtis* v. *Metcalf*, 259 Fed. 961, 963-64 (D.R.I. 1919), and *Chesbrough* v. *Woolworth*, 244 U. S. 72, 78-79 (1917), but we take the opinion as we find it.

(1 Cir. 1920); see also *Curtis* v. *Metcalf*, 259 Fed. 961, 964-66 (D. R. I. 1919). Examination of the briefs in the Supreme Court discloses that the appellant's argument on this score went not to domination as such but rather to knowledge. "Three-fifteenths of a board of directors," it was urged, "is not enough to make their knowledge tantamount to knowledge by the bank." Although the domination issue thus was raised by the facts, the Supreme Court seems not truly to have focused upon it; and while the decision must be taken into account, we do not consider it nearly so conclusive in defendant's favor as did the district judge.

The three precedents in this Court that have been cited to us[4] do not assist decision much further. In *Michelsen* v. *Penney*, 135 F. 2d 409, 415 (2 Cir. 1943), an action by depositors and a receiver of a national bank against directors, we said that "the statute is tolled while a corporate plaintiff continues under the domination of the wrongdoers," and found that to be true until the receiver's appointment. But the directors other than Penney were "legally unqualified dummy directors," see 41 F. Supp. 603, 610 (S.D.N.Y. 1941), and it was for that reason that the court, shifting at this point to a theory of concealment, concluded that "notice should not be imputed to the bank, because all these new directors were elected by the controlling Penney group, many of them were lent qualifying shares by this group, and none of them were independent

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[4] We regard *Laird* v. *United Shipyards, Inc.*, 163 F. 2d 12, 15-16 (2 Cir.), cert. denied, 332 U. S. 842 (1947), as without relevance both because of the finding that at the time of the alleged breach of duty "all parties then having any interest in the corporation were fully aware of all the facts," and because the language "Nor is the statute tolled because those alleged to have been derelict in their duty were in control of the group," clearly referred to the New York, not the federal, rule.

in any real sense." 135 F. 2d at 416, n. 2. In *Austrian* v. *Williams*, 103 F. Supp. 64 (S. D. N. Y. 1952), an action by the reorganization trustee of Central States Electric Corporation against directors and others, Judge Weinfeld found that Williams' domination of Central States, as to which see his review of the facts, 103 F. Supp. at 71-75, "was so pervasive that it effectively prevented the proper institution of actions against him and the directors liable with him." *Id.* at 115. Since this sentence was followed by the statement, "The nature and extent of the domination was such as effectively to conceal by its very existence the significant facts of the transactions under attack," it is not clear whether Williams' domination alone would have been considered enough under the circumstances, and this court's view as to the inapplicability of federal principles made it unnecessary to resolve that issue here. *Austrian* v. *Williams*, 198 F. 2d 697, 700-02 (2 Cir.), cert. denied, 344 U. S. 909 (1952).[5] In *Moviecolor Limited* v. *Eastman Kodak Co.*, 288 F. 2d 80, 88 (2 Cir.), cert. denied, 368 U. S. 821 (1961), we again recognized "adverse domination" of a corporation as a basis for tolling the statute with respect to a federal claim, and characterized it as "an exception which, though sometimes bulked with concealment, in fact rests on grounds akin to undue influence or duress." However, we were not required to mark out the boundaries of the doctrine since we found the complaint "falls far short of" alleging control by the wrongdoers.

While the parties have cited many other federal decisions going in various directions, we see little to be gained

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[5] The opinion distinguished *Michelsen* v. *Penney*, *supra*, as expounding a "federal doctrine," 198 F. 2d at 700, applicable to an action to enforce the liability of a national bank director, compare fn. 3, although the *Michelsen* opinion was by no means clear on that point, see 135 F. 2d at 415, 416, n. 2.

by detailed analysis of them.[6] Many did not have to, or at any rate did not, distinguish between domination *qua* domination, i.e., as affecting the ability to sue, and domination as effecting concealment. None involved control by a single owner, as distinguished from a majority of more or less guilty directors some of whom might decide that their liability in a suit brought by the corporation would be less than their liability for not bringing one. Almost all were actions in behalf of depositors in insolvent national banks. In some ways that point operates in favor of tolling since it seems hard to charge such creditors with the failures of knowledgeable stockholders or the delinquencies of knowledgeable and independent directors; in other ways it operates against it, because in many cases the facts were known by National Bank Examiners, "the real 'eyes of the bank' " and the Comptroller of the Currency could "compel restitution, resignation, or a receivership." *Hughes* v. *Reed*, 46 F. 2d 435, 442 (10 Cir. 1931).

One principle emerging with some clarity is that a plaintiff who seeks to toll the statute on the basis of domination of a corporation has the burden of showing "a full, complete and exclusive control in the directors or officers charged." *Payne* v. *Ostrus*, 50 F. 2d 1039, 1042 (8 Cir. 1931). Such control was found, for example, in *Adams* v. *Clarke*, 22 F. 2d 957 (9 Cir. 1927), where all the directors were accused of wrongdoing and held a majority of the capital stock, and also in our *Michelsen* case, *supra*. This principle must mean at least that once the facts giving rise to possible liability are known, the plaintiff must effectively negate the possibility that an informed stockholder

[6] A goodly number are cited in an elaborate footnote to the opinion in *Michelsen*, 135 F. 2d at 416, n. 2. However, Judge Clark's law clerk failed him in one respect; the cases, other than *Curtis* v. *Connly*, cited in support of the first sentence should be transposed to the second, and those cited under the second sentence should be transposed to the first.

or director could have induced the corporation to sue. And here we think IRCA fails.

While the odds may have been against the likelihood that IRCA's board of directors would have authorized an antitrust action against UF between May 1959 and February 1961, the possibility can by no means be dismissed as negligible. By that time, only four of the old-time directors remained. One of the replacements, Yaeger, would have been highly responsive to a stockholder's demand, see note 2, *supra*, and this also seems likely as to two others, Ruckle and Cunningham.[7] Nor can we simply assume that the other directors would have been obdurate. While plaintiff cites the Referee's excoriation of the IRCA directors with whom he was concerned,[8] the very vigor of that then recent expression, its affirmance by the New York courts, the 1958 decree of divestiture in the Government's antitrust suit, and the legal implications of arbitrary refusal to bring an apparently justified suit would hardly have escaped the minds of the directors, and certainly not of counsel to whom they would surely have referred a stockholder's or director's request. See Baker & Cary, Corporations, Cases and Materials 470-71 (1959); cf. *Wolf* v. *Barkes*, 348 F. 2d

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[7] Ruckle regularly gave information to aid Price, another IRCA stockholder elected a director in 1961, in a derivative suit claiming interference by UF with a program of dieselization of IRCA. The record also shows that in 1959 Ruckle, Cunningham and Price met with the attorney for Ripley to discuss the railroad's operation.

other directors would have been obdurate. While plaintiff cites the Referee's excoriation of the IRCA directors with whom he was concerned,[8] the very vigor of that then re-

[8] "It is difficult to consider with patience the lack of information, inquisitiveness, of prudent care, and of concern of these directors and principal managers of IRCA as testified to by themselves in respect of the very important items of rates and contracts and dealings between their own company, IRCA, and its principal customer-shipper, U. F. Co. These men, it is found, were otherwise as U. F. Co. states it 'upright and honorable men' of high standing and unblemished reputation. * * *"

994, 996 (2 Cir.), cert. denied, 382 U. S. 941 (1965). In this connection, we find considerable significance in the changed position taken by IRCA in the *Ripley* action where in 1958, after the Referee's decision, it urged that the judgment "should be supported and increased," to reflect the full difference between the rates to UF and to independents. While this could be dismissed as cheap insurance for the directors with no real harm to UF since IRCA was merely supporting a position the plaintiff-stockholders were taking anyway, it is equally reasonable to regard it as meaning that the directors, even before the election of the three independents, had come to recogize their duty to protect the corporation once the spectre of loss of the UF contracts had been dissipated. Taking everything into account,[9] we cannot conclude that a demand on the IRCA directors for the institution of a treble damage action between May, 1959 and February, 1961 by a stockholder or director would necessarily have been fruitless.[10] UF's control of IRCA thus was no longer "full, complete and exclusive" in the

[9] The directors also could not have overlooked the risk of dislodgment despite UF's large stock interest. In the 1952 election, five years before the Referee's findings in *Ripley*, the management slate received the votes of only some 51,000 shares other than the 256,000 owned by UF, the independents got some 204,000, and about 89,000 shares, or nearly 15% did not vote. In an election that would have been featured by cries as to the majority's refusal to authorize a multi-million dollar suit against UF arguably called for by the *Ripley* findings and with no risks save the expense of litigation, a considerably larger total vote and an even greater proportion against the UF slate would have been likely. With 95% of the stock voting, UF would have had to retain the suffrage of 29,000 of the independent shares to prevail. Even assembling a respectable management slate would not have been easy under the circumstances.

[10] While this issue is one on which plaintiff might have been entitled to take evidence, it raised no objection either in the district court or here to disposition of UF's motion on the affidavits and records submitted, and it has not adverted to any further evidence that might be introduced on this point.

sense here relevant.[11] We thus leave for another day the more difficult question whether or under what circumstances the mere possibility of suit by an informed stockholder or director would end tolling due to "domination" of a corporation by the alleged wrongdoer.

In upholding the partial defense of limitations in this case, we are thoroughly mindful that "the treble-damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute," *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358, 365 (9 Cir. 1955), and "for the purpose of multiplying the agencies which would help enforce the antitrust laws and therefore

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[11] IRCA cites *Delaware & Hudson Co.* v. *Albany & Susquehanna R.R.*, 213 U. S. 435 (1909), which held that shareholders could bring a derivative suit without making the prior demands on management and the shareholders then required by Equity Rule 94 where a majority of the corporation's directors were officers or directors of the corporation alleged to have inflicted the injury and the latter owned 22.9% of the injured corporation's stock. It argues that the question in that case was whether the plaintiffs could reasonably assume that management itself would not bring a suit in the corporation's interests when a majority of the board of directors was controlled by the prospective defendant; that the Supreme Court held in the affirmative; and that the question in this case is the same. Quite apart from the important distinction that only one of IRCA's directors in 1959 was an officer or director of UF, the problems are dissimilar. The basis for barring a derivative suit without prior demand is simply the lack of reason for such an action if the corporation is willing to sue itself, a principle adopted for the benefit of the very corporation that will profit from successful prosecution of the suit. We here enforce the important policy of the statute of limitations in protecting a defendant from stale claims; a court should require a clear showing before applying a judicially created exception. Although the question asked in the two situations thus may be formally the same, a plaintiff must go further in negating the possibility of suit by the corporation in the situation here *sub judice* since tolling the statute of limitations is far stronger medicine than dispensing with a demand as a condition to the bringing of a derivative action and will impinge upon different interests.

make them more effective." *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F. 2d 891, 893 (5 Cir. 1954), cert. denied, 348 U. S. 912 (1955). See *United States* v. *Borden Co.*, 347 U. S. 514, 518 (1954). But one may well question how far these policies would be furthered by a rule that would often permit the collection of treble damages accruing over decades and thus might seem rather an overkill.[12] Moreover, the statute of limitations itself embodies a strong policy "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348-49 (1944). There could hardly be a better case for enforcing the policy than this, where UF has already suffered two judgments for its misdeeds and recovery of damages for more than three decades would result in a huge windfall to most of the present stockholders of IRCA and an unexpected loss to many innocent ones of UF.[13]

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[12] Indeed, disregard of the statute of limitations might impede efforts by the Government to obtain divestitures by consent. If UF had retained its stock ownership in IRCA, it would have shared *pro tanto* in any recovery from itself; a controlling stockholder may well be reluctant to sell, at a price reflecting only usual business considerations, if the corporation under new ownership can recover treble damages reaching over decades. And there is surely some anomaly in a doctrine whereby, although there could be no recovery against a former 100% stockholder, and a present 90% stockholder would suffer to the extent of only 10% of the amount recovered in a derivative action, 100% damages without limit of time could be obtained after a 90% stock interest was divested at a price in no way reflecting the claim.

[13] Recovery of the damages sought, without taking account of income taxes, would amount to some $845 for each share of IRCA, and to some $62 per share of UF, currently selling around $31.

(Footnote continued on following page)

Since IRCA has not met its burden of demonstrating that, after the election of the three independent directors in 1959, UF had such "full, complete and exclusive control" as to rule out the possibility of a corporate suit against it, on the demand of a stockholder or director, for antitrust violations the facts giving rise to which had become well-known, any tolling of the statute ended at least by that time. In consequence the District Court properly held that all claims under the antitrust laws arising prior to February 16, 1961, were barred by limitations.

III.

Our holding on the statute of limitations reduces the importance of the branch of UF's motion based on the rule against splitting a cause of action almost but not entirely to the vanishing point. With all claims prior to February 16, 1961, save so much of the fifth as concerns breach of contract,[14] barred by the four-year statute, the only remaining ones that would be excluded by the splitting rule are the antitrust claims relating to the period between that date and the dissipation of the effects of UF's control consequent on the sale of its stock in Janu-

(Footnote continued from preceding page)

While the *ad damnum* may be on the optomistic side and income taxes and deductions would cut the amounts roughly in half, the figures remain huge. Yet 68% of the common stock of IRCA is owned by a recent purchaser, and some notion as to how few of the minority stockholders date back to an early period is conveyed by the fact that of the 26 plaintiffs in the *Ripley* action, brought in 1949, only two had acquired their stock before 1945.

[14] Although the District Court's judgment dismissed so much of the third and fifth claims as related to matters occurring before February 16, 1961, "on the ground of *res judicata*," this direction as to the fifth does not accord with the language or theory of the opinion, see 254 F. Supp. at 239.

ary 1962. Moreover, the second claim may have scant practical application to that relatively recent period in view of the provisions for rate increases in the *Ripley* judgment.

Starting from the doctrine that a plaintiff must recover all damages arising from given operative facts in a single action, Restatement, Judgments, § 62, defendant contends that the facts relied on by IRCA for recovery under the antitrust laws in this action are the same as those sued on by its stockholders in *Ripley*. Plaintiff disputes this; it claims that the rule against splitting is inapplicable when the first suit was brought in a forum which lacked power to give the relief sought in the second, thereby distinguishing such cases as *Williamson* v. *Columbia Gas & Elec. Corp.*, 186 F. 2d 464 (3 Cir. 1950), cert. denied, 341 U. S. 921 (1951), *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 295 F. 2d 362 (5 Cir. 1961), and *Engelhardt* v. *Bell & Howell Co.*, 327 F. 2d 30 (8 Cir. 1964); and it argues that in no event should the rule be applied when a forum without power to give full relief was chosen not by the corporation now plaintiff but by stockholders forced to act in its behalf because of an unwillingness to sue dictated by the defendant, especially when they were ignorant of antitrust violations when the suit was brought.[15]

On the point of fact raised by the argument, the situation seems as follows: The gravemen of the *Ripley* complaint was the unduly and discriminatorily favorable rates accorded UF on its own shipments (the claim asserted as Second in the instant action), and the rate divisions on coffee exports and commodity imports; nothing in it can

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[15] Plaintiff also argues that when the *Ripley* action was brought in 1949, we had not yet decided *Fanchon & Marco, supra*, 202 F. 2d 731, holding that derivative actions for violations of the antitrust laws would lie, but we do not consider that point to have substance.

fairly be read as raising the claims now asserted as First or Fourth, and the Sixth is a different ground for the damage claims previously asserted. The proof, however, appears to have taken a wider range and the Referee made many findings relevant to what are now the First and Fourth claims, although he repeatedy made clear,[16] as did the New York Court of Appeals, that claims for violations of the antitrust laws were not at issue. See 8 N. Y. 2d at 446, 209 N.Y.S. 2d at 300. The *Ripley* plaintiffs did not seek a judgment for the loss of the traffic of independents. While they did request judgment in excess of $8,000,000 for unfair divisions on export traffic, the Referee declined to grant any, evidently considering that the proof showed only that IRCA had been forced to reduce its own rates to meet truck competition.

To support its position that the action in the New York courts, which lack power to grant relief under the antitrust laws, could not preclude a later federal treble damage suit, plaintiff relies heavily on Judge L. Hand's well-known holding, in *Lyons* v. *Westinghouse Elec. Corp.*, 222 F. 2d 184 (2 Cir.), cert denied, 350 U. S. 825 (1955), that a state court's overruling of an antitrust defense would not bar a federal suit for treble damages brought by the state court defendant. Defendant distinguishes this, as did the district judge, 254 F. Supp. at 237-38, on the basis that there it was the antitrust defendant, not the antitrust plaintiff, who invoked the state forum. Defendant further asserts that, whatever may be thought of plaintiff's distinction of *Williamson* and the other cases cited above, this cannot explain away our old decision in *Straus* v. *American Publisher's Ass'n*, 201 Fed. 306 (2 Cir. 1912), appeal dismissed, 235 U. S. 716 (1914). Straus had first sued in a New York

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[16] At the instance of counsel for UF, the Referee sustained objections to arguments and evidence which were relevant only to antitrust violations and not to breaches of fiduciary duty.

court under the state and federal antitrust laws for an injunction and damages with respect to an agreement to fix prices of books, and the Court of Appeals had held the agreement valid as to copyrighted although not as to uncopyrighted works. While Straus' appeal to the Supreme Court was pending, he sued in the district court under the federal antitrust act alone. This court held the state judgment conclusive, the opinion saying in one breath that the state court was without jurisdiction of the complaint founded on the federal statute and in the next that the "question was actually involved in the cause before the state court, which was competent to decide it." The Supreme Court later reversed the New York judgment on the merits, 231 U. S. 222 (1913), making a remark equally hard for modern ears to understand: "This view of the case renders it unnecessary to decide whether an original action can be maintained in the state courts seeking an injunction and to recover damages under the Sherman Law." 231 U. S. at 237.

The *Straus* case is not directly in point since it held the federal plaintiff barred not by failure to assert a federal claim in the state court but by the state judgment against him upon it. Even as to that, however, Judge L. Hand overruled *Straus* in denying a petition for rehearing in *Lyons, supra,* 222 F. 2d at 195. We think it was well overruled even though, as defendant urges, it perhaps did not need to be in order to support the *Lyons* result.

Since what *Lyons* said in overruling *Straus* would necessarily mean that a judgment in favor of a state court defendant in an action seeking relief under the federal antitrust laws would not bar a subsequent federal suit,[17]

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[17] We do not deal here with a case where the jurisdiction of the state court was challenged and upheld by it, albeit erroneously. See *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939); *Alleghany Corp.* v. *Kirby*, 340 F. 2d 311, 312, n. 1 (2 Cir.), cert. granted, 381 U. S. 933 (1965), dismissed, 384 U. S. 28 (1966).

it does seem hard to understand how a plaintiff's successfully suing in a state court on a claim that might have been but was not made the basis for antitrust relief can have a larger effect. Compare Restatement, Judgments, § 62, Comment on Clause (a), p. 255.[18] We find it unnecessary to decide this, however, since our ruling as to the statute of limitations brings the case to us in a posture, generally limited to damages suffered after February 16, 1961, quite different from that in which the issue was considered by the district judge. "On the whole, the principle against splitting is a salutary doctrine" but "inflexibly applied there can be little doubt that it results at times in unwarranted hardship." 1B Moore, Federal Practice ¶ 0.410[2] at 1169 (2d ed. 1965). It surely was not incumbent on the stockholders who brought the *Ripley* action in 1949 to recover all damages IRCA might sustain until the end of time from acts of UF of the sort there attacked, even those incurred after the period, through 1960, as to which proof of damages was made. Indeed, if the prior judgment had been in a federal treble damage suit by the corporation, it would not preclude recovery for subsequent antitrust violations. *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322 (1955). The complaint should therefore not have been dismissed as to claims within the appropriate period of limitations.

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[18] Section 62k of the Restatement suggests that where the plaintiff sues in a court whose sovereign cannot or has not made available a court which can afford the plaintiff relief for his entire cause of action, there is no bar to a subsequent suit on the unredressed portion of that cause of action in the court of another sovereign which does afford such relief. This seems much closer to the case at bar than the rule of § 62j, relied on by the district judge, 254 F. Supp. at 238, which deals with a prior suit brought in a court of limited jurisdiction where the sovereign has made available another court with jurisdiction to grant all the relief sought.

IV.

Plaintiff's appeal from the denial of its motion for partial summary judgment is without merit. Since the *Ripley* complaint did not and could not properly have asserted a claim under the federal antitrust laws, the judgment cannot have adjudicated that UF violated them; on this point the overruling of *Straus, supra,* 201 Fed. 306, by *Lyons, supra,* 222 F. 2d 184, works for the defendant. The utmost effect the prior judgment could have had in this action on any view would thus have been as an estoppel on questions of fact actually litigated; and we need not now decide how far it would even have that. See Restatement, Judgments, §§ 68 and 71, and *Lyons, supra,* 222 F. 2d at 195-96. With this action limited to damages after February 16, 1961, save on the contract claim which plaintiff does not contend to have been considered in *Ripley,* the role of the findings and judgment in the prior action is even more limited.

The judgment is affirmed insofar as it barred claims for damages under the antitrust laws accruing before February 16, 1961, is reversed insofar as it went beyond this, and is affirmed insofar as it denied plaintiff's motion for partial summary judgment. No costs.

APPENDIX B

Plaintiff's Overwhelming Evidence It Never Had an Opportunity to Offer*

A. Sullivan & Cromwell advised IRCA in July of 1959 that they concluded "it would be better for us to retire as counsel and thus to leave the directors entirely free to select other counsel." Mr. Tennyson sent Mr. McGovern, IRCA's board chairman and general attorney of United Fruit, a *draft* of a reply to Sullivan & Cromwell "requesting that they continue as general counsel to IRCA and in particular to represent us in the appeal from the judgment in the *Ripley* case." But Mr. McGovern changed that draft significantly. He only requested "Sullivan & Cromwell to continue to represent [IRCA] in the appeal from the judgment of the Appellate Division in the *Ripley* case and expressed the hope that the services of Sullivan & Cromwell would be available for other matters "if we have need to call on them." It was clear what Mr. McGovern meant. On July 9, 1959, Mr. Tennyson advised Mr. Haase that "with the exception of matters connected with the *Ripley* case, *Sullivan & Cromwell should not be consulted as counsel and Mr. McGovern thinks you should be governed accordingly.*" In fact Mr. McGovern did not consult the Board on that specific point. The IRCA board minutes show that all legal matters not dealing with *Ripley* were directly controlled by Mr. McGovern.

B. Demand, in effect, was made on an IRCA officer and director and its counsel and *refused.*

1. After the Referee's decision in *Ripley,* several stockholders or their representatives in 1958 demanded that IRCA and Sullivan and Cromwell require United Fruit to

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* (Excerpts from plaintiff's motion for leave to file a petition for rehearing in the Court of Appeals on October 27, 1967, docket pages 1541-1549.)

pay the same rate which is charged its competitors for carrying bananas since this was required by Article VI (A)(9) of the government's antitrust judgment, dated February 4, 1958, against United Fruit.

One stockholder's representative referred to Article VI(A)(9) of said judgment and made the following demand on Mr. Tennyson, Secretary and a *director* of IRCA:

> "Mr. Kritzer stated that U. F. Co., by not paying I.R.C.A. the same car-load rates as were charged other banana shippers, was acting in defiance of the law, and that I, as a Director, should proceed to effect collections accordingly."

Mr. Tennyson sent a copy of his memo and Mr. Kritzer's letter to Mr. Beal, Chairman of the Board and Sullivan & Cromwell, as counsel to IRCA.

That demand was refused.

Plaintiff submits that the demand and refusal indicate that IRCA, after the Referee's decision, was still not willing to sue United for antitrust violations.

C. After the Referee's decision, Sullivan & Cromwell advised IRCA that United had appealed, that plaintiffs-stockholders were expected to appeal on the ground that damages were inadequate and that IRCA should appeal on the same grounds. They advised that prosecution of the appeal to increase money damages should be left to counsel for plaintiffs-stockholders since participation by IRCA's counsel would be duplicative.

On June 30, 1959, after the affirmance by the Appellate Division, Sullivan & Cromwell advised IRCA to support plaintiffs' appeal in the Court of Appeals as the only *reasonable* position for IRCA to take:

> "Since the case is in any event to be reviewed by the Court of Appeals, it seems that the only reasonable

position for IRCA is to appear in that Court to ask an increase in the amount of the judgment and to ask that in all other respects the judgment be affirmed."

In March 1958, Mr. Coolidge, Chairman of the Board of United, discussed with Mr. Bradshaw IRCA's position in the lawsuit at that time "as opposed to its original policy of fighting the claims made on behalf of the minority stockholders."

Mr. Bradshaw's memorandum stated:

> "During our conversation I emphasized the fact that all the Directors of IRCA, *far from being opposed to the United Fruit Company, were very friendly disposed* and always had been, and regretted the difficult and unfortunate situation in which they were placed by the lawsuit. I informed him that we felt very strongly that we had *no option* in this situation but to follow advice of counsel and that if we did not do this we would place ourselves in a very serious situation with our stockholders and *lay ourselves open to attack for personal liability.*"

Accordingly, it is a complete *non sequitur* to say that because IRCA supported plaintiffs-stockholders' appeal in the state courts in *Ripley*, it would have sued United (and exposed themselves to suit) for antitrust violations.

D. After the Referee's decision in *Ripley*, the Chairman of the Board of IRCA and another IRCA director met with both the Chairman of the Board and President of United in October 1958 and discussed with them "the necessity . . . of working out a more satisfactory relationship between the management of IRCA" and United. Certain concrete proposals were made to United which it agreed to consider. Although reminded of it in the interim,

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United had not responded to the proposals by February 1959. IRCA's board chairman then advised the President of United in February 1959, that under such circumstances he and four other directors would not stand for re-election at the Annual Meeting of Stockholders scheduled to be held in June of 1959.

United had not responded to the suggested proposals of IRCA, but instead of fighting United, the five directors took the easy way out and resigned. Those directors who remained were most clearly in United's pocket; they proceeded to elect Mr. McGovern, Chairman of IRCA's Board. United's control thus became more direct than ever. Before this time, United had exercised its domination more indirectly, to wit, through the device of advice offered by Special Advisor Pollan to the IRCA Board, its Chairman and President. In 1959, that control became direct and Mr. McGovern as Chairman of the IRCA Board, dominated it and directed the President and others as to what was to be done. United's domination was thus more open and direct after 1959, and if possible, even more ironclad than before.

The pertinent letter from Mr. Beal, IRCA's Board Chairman to Mr. Redmond, President of United, is dated February 13, 1959 and states:

> "About the middle of last October, as you will recall, Mr. Sutphen and I discussed with you and Mr. Gardner [Chairman of United's Board] the necessity (as we saw it) of working out a more satisfactory relationship between the management of IRCA and your Company. We made concrete suggestions which you then undertook to consider. We have heard nothing from you since that time, although I reminded you of the matter some weeks ago.
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"Under these circumstances, Mr. Sutphen and I have concluded that we will not stand for reelection as Directors of IRCA at the next Annual Meeting of Stockholders, now scheduled to be held on June 3, 1959. Messrs. Chanler, Dixon and Leib have advised us that they will also not stand for reelection at this meeting. We have no present information as to the intentions of the other Directors except that Mr. Bradshaw has resigned as President and as a Director of IRCA effective March 31, 1959, and it has been proposed to elect Mr. Haase as a Director to succeed him."

E. For the stockholders' meeting on June 4, 1958, after the Referee's decision, the IRCA directors presented a slate of eleven directors, which included Oliver R. Grace, a stockholder active on behalf of plaintiffs-stockholders in *Ripley*. On June 2, 1958, United's Board Chairman advised IRCA that it did not intend to vote its stock for the election of directors (at that time 241,100 shares out of 600,000 outstanding shares entitled to vote), "unless something occurs at the meeting that we do not presently anticipate that would make such a course advisable."

United in said letter further advised that it had appealed from the judgment against it and in *"the present posture of that appeal United Fruit Company is averse to exercising its right to vote its IRCA stock unless necessary."*

That United letter was read at the stockholders' meeting. A management slate of eleven, including Oliver Grace, was nominated; an opposition slate of eight directors, also including Oliver Grace, was nominated.

Mr. McGovern announced that United would vote its stock. Nominations were closed.

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Walter B. McGregor was elected over Oliver R. Grace *solely* on the vote of United's block of 241,100 shares. He received no other votes. He was not even nominated. Mr. McGregor was United's nominee, pure and simple.

When the independent slate attempted to take over control, United through McGovern, blocked them by voting United's stock to insure continuing control. This all occurred *after* the Referee's decision.

F. Out of the eleven directors elected at the 1958 stockholders' meeting, one resigned and five others refused to stand for re-election in 1959. Of the *five directors willing to stand for re-election,* four had been directors of IRCA since at least 1949, to wit, Messrs. McGovern, Partridge, Tennyson, and Willer. These men were in United's pocket and *Ripley* so held. Mr. McGregor was United's nominee in 1958. Mr. Haase, the executive Vice President of IRCA, and an employee of IRCA during the period of United's domination since 1930, was elected a director prior to the 1959 annual stockholders' meeting. Mr. Haase was under United's control and domination and was the sixth director on a *nine* man management slate for 1959. (The number of directors had been reduced from eleven to nine.) On March 10, 1959 an article in the Wall Street Journal referred to the resignation of Mr. Bradshaw and the refusal of five other directors to stand for re-election and reported that a United Fruit spokesman said:

> "United Fruit would welcome to the Board of International Railways any substantial stockholders who are really interested in the railroad and *not with lawsuits.*"

Mr. McGovern on behalf of IRCA interviewed stockholders for the purpose of filling the three vacancies on the man-

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agement slate. For this purpose Mr. McGovern approved Messrs. Ruckle, Cunningham and Yaeger. At the 1959 meeting, an independent slate of nine, including Messrs. Ruckle and Cunningham, opposed the management slate.

Had United not voted its stock, the entire independent slate would have won. Only Ruckle and Cunningham, who were on both slates, were elected. United was still not willing to turn over control of the railroad to an independent board.

At the board meeting of IRCA, the next day, Mr. McGovern was elected Chairman of the Board at a salary of $15,000 per year even though he was still the General Attorney for United Fruit Company. Mr. Haase was elected President.

G. Further evidence of United's pervasive domination was that in the period after 1958, at least, the railroad was not making any money on United's bananas shipped from the west coast of Guatemala, and did nothing about it. Despite this, United's banana shipments were so unusually heavy during the spring of 1958 that IRCA was unable to keep the profitable import cargo moving. Moreover, in 1959 IRCA lost considerable coffee and other freight traffic to trucks due to its inability to furnish cars when requested. IRCA preferred United's unprofitable business over profitable business. No independent management would have permitted such a situation to continue.

Mr. Bradshaw recorded the following conversation with Mr. Coolidge, the Chairman of United's Board, on March 26, 1958:

> "Mr. Coolidge asked me whether the Fruit Company's business was important to I.R.C.A. I told him that I considered it of great importance, provided we

received tariff rates on the bananas from the West Coast to Barrios, but that I doubted whether we were now making any money on this business at rates established by the contract between the two companies."

Not to make a profit on the biggest segment of one's business, to wit, United's shipments, and in addition, to turn away profitable traffic to accept United's unprofitable business is a further demonstration of United's iron grip on IRCA in the post-1958 period.

APPENDIX C

Excerpts From United's Brief in United States Court of Appeals (pp. 55-6).

"Appellant attempts to counter this argument by referring (br. 45 and elsewhere) to the findings of 'domination' which were made in *Ripley*. Such a reference misses the point. The 'domination' found in *Ripley* was the kind of domination which the New York courts held was sufficient to impose upon United a fiduciary duty to Railways and its other stockholders. Having established the existence of a fiduciary relationship, the New York courts then went on to declare that the contracts between the parties were unfair to Railways and that their terms should be adjusted accordingly. That kind of domination, which the New York courts held sufficient to establish a fiduciary duty, we submit, is altogether different from the complete control which may be sufficient to toll the running of the statute of limitations. We may concede for present purposes (as *Ripley* determined) that United dominated Railways to such an extent as to become accountable to Railways on a fiduciary basis. We may even concede for present purposes that the degree of 'domination' found in *Ripley* may have been sufficient to prevent Railways from bringing an action in its own name, as the Appellate Division pointed out in the quotation at appellant's br. 45-6.*

* "It is equally obvious here that demand upon the directors of IRCA to sue UFCo, in connection with the acts and transactions complained of in the instant action, would have been a useless and futile act. (*Sage* v. *Culver*, 147 N. Y. 241, 246; *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.*, 213 U. S. 435, 451.) No fair and honest consideration of such a demand could have been anticipated under the circumstances; nor could there be any

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* Appellate Division quotation from appellant's brief, pp. 45-6.

Excerpts From United's Brief in United States Court of Appeals (pp. 55-6).

reasonable expectation of any just and vigorous prosecution of a suit. The IRCA board was under the influence of UFCo with respect to the causes of action which could be asserted against UFCo . . .

"'Where an antagonistic position is demonstrated, stockholders have the right to remove the matter from the hands of management and bring an action in a representative capacity. (*Chaplin* v. *Selznick,* 186 Misc. 66, 68.) Since futility of demand was shown by the evidence establishing interest or bias on the part of the directors, plaintiffs were entitled to proceed with the action. Surely, we would not compel them to entrust the prosecution of such an action in the hands of persons who would be opposed to the success of the suit.'

"But even that kind of domination did not prevent the *Ripley* stockholders from suing; nor would it have prevented either the *Ripley* stockholders or (after 1959) the independent *Ripley* directors from suing on Railways' behalf on the present claim. Under the *Curtis* doctrine (whatever the fiduciary relationship involved) the statute of limitations accordingly was not tolled."